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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1103

CHARLES E. WILSON, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

WILLIAM S. GIRARD, UNITED STATES ARMY SPECIALIST 3/C

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the District Court has not yet been reported. It is reproduced in Appendix B, *infra*, pp. 38a–50a.

JURISDICTION

The order of the District Court denying the petition for a writ of habeas corpus but granting declaratory relief and an injunction against petitioners was entered on June 18, 1957 (Appendix B, *infra*, p. 51a). A notice of appeal to the Court of Appeals for the District of Columbia Circuit was filed on June 18, 1957, and the appeal was docketed in that court on the same day. The case has not been heard, submitted to,

or decided by the Court of Appeals. A petition for a writ of certiorari was filed on June 20, 1957; a cross-petition by respondent was filed on June 21, 1957, No. 1108, Oct. Term, 1956. Both petitions were granted on June 21, 1957. The jurisdiction of the Court rests on 28 U. S. C. 1254 (1) and Rule 20 of the Rules of this Court.

QUESTION PRESENTED

Pursuant to treaty, Japan and the United States have entered into an agreement under which the United States may exercise court-martial jurisdiction within Japan over certain offenses committed there by American servicemen, but may also determine not to exercise its right to try such offenses and may remit the serviceman to a Japanese court for violation of the local law. In this case, the United States has determined not to exercise its right to try respondent by court-martial, and is prepared to remit him for trial under the law of the local sovereign, Japan. The question presented is:

Whether a United States court should review and reverse the decision of the Government that respondent should not be tried by court-martial and that the Japanese courts may try him for conduct in Japan resulting in the death of a Japanese national.

TREATIES, AGREEMENTS, AND STATUTES INVOLVED

Paragraph 3 of the Protocol amending Article XVII of the Administrative Agreement under the Security Treaty between the United States and Japan reads as follows:

> In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> * * * * *
>
> (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

The full text of the Protocol and of the Security Treaty and excerpts from other relevant documents are reproduced in Appendix A, *infra*, pp. 3a–37a.

Article 14 of the Uniform Code of Military Justice, 10 U. S. C. (Supp. IV) 814, provides in pertinent part:

> (a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.
>
> * * * * *

Article 5 of the Uniform Code of Military Justice, 10 U. S. C. (Supp. IV) 805, provides:

> This chapter applies in all places.

STATEMENT

On January 30, 1957, members of a United States military unit in Japan were engaged in exercises involving live ammunition. Because of the large

number of Japanese civilian nationals present in the area, live ammunition was withdrawn and blank ammunition substituted. During an interval in the maneuvers, respondent Girard, a Specialist 3rd Class (equivalent to sergeant), and another soldier, one Nickel, were ordered to guard a machine gun and some field jackets that had been left on the far side of a hill.

Girard had a grenade launcher on his rifle. He had been armed with the same weapon during the morning exercises in which he had participated and during which he had fired some 80 rounds of ball ammunition. After the two soldiers had arrived on the ridge, Girard, on two occasions, placed an expended .30 calibre cartridge case in the grenade launcher and projected it by firing a blank. The second shot struck Mrs. Naka Sakai, a Japanese woman, who had been gathering expended brass cartridge cases and was not over 30 yards away from respondent. The casing penetrated her back and caused her death.

The incident occurred in a maneuver area provided by the Japanese Government for part-time use of United States forces. The Japanese Defense Force uses the same area about 40 percent of the time. When the area is not in use by either the United States or Japanese armed forces, Japanese civilians are permitted to farm or otherwise use the area.

There were conflicting accounts of the circumstances of the shooting; the available statements of Girard and the other eye-witnesses (including Nickel, re-

spondent's fellow-soldier) are far from harmonious. See the "Affidavit With Respect to Facts", dated June 8, 1957, by General Counsel Dechert of the Department of Defense, which was filed in the District Court and is part of the record in this Court.[1] In particular, some witnesses stated that the soldiers had thrown brass casings onto the ground and indicated that it was all right for the civilians to pick them up.[2]

Whatever the true facts, the Government has agreed that, for the purposes of the present stage of this litigation and only for that purpose, the killing may be deemed to have arisen out of an act done in the performance of official duty—as contended by respondent—but the Government has never agreed, nor has respondent contended, that he was ordered to use his gun in this fashion.

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[1] This affidavit was offered by the Government under seal solely because the material contained therein might be prejudicial to respondent's defense if he is to be tried either by a Japanese court or by a court-martial. The Government has no other reason for keeping the affidavit under seal. The District Court accepted it under seal, and maintained it in that condition.

[2] The joint statement by the Secretaries of State and Defense, issued June 4, 1957, to which respondent refers in his petition for a writ of habeas corpus, states that the Secretaries' review of the matter disclosed, among other things, that Mrs. Naka Sakai "was not over 30 yards from Girard and was going away from him when he fired the rifle. Girard had previously fired similarly in the vicinity of a Japanese man, who was not hit. * * * [Girard] asserted that he fired from the waist, intending only to frighten the Japanese civilians. Others stated, but Girard denied, that empty shell cases were thrown out to entice the Japanese to approach."

On February 7, 1957, Girard's commanding officer filed a certificate of official duty with the local Japanese authorities, *i. e.*, a certificate that the killing had arisen out of an act done by respondent in the performance of his official duty. Two days later, the local Japanese authorities notified the United States commanding officer who had issued the certificate that they considered that proof contrary to the certificate existed. The matter was referred to the Joint Committee which was established by Article XXVI of the Administrative Agreement (Appendix A, *infra*, pp. 18a–19a) under Article III of the Security Treaty between the United States and Japan (Appendix A, *infra*, p. 11a).

In the Criminal Jurisdiction Subcommittee of the Joint Committee, to which the matter was referred, both countries agreed that the killing of a Japanese woman was an offense against Japanese law as well as an offense against United States military law, and that, therefore, under Article XVII of the Administrative Agreement (as amended by the Protocol signed September 29, 1953) (Appendix A, *infra*, p. 23a–25a) the two countries had concurrent jurisdiction. The United States took the position that the offense was one

> arising out of any act or omission done in the performance of official duty,

and that therefore this was a case in which the United States had the primary right to exercise jurisdiction, as provided in Paragraph 3 (a) (ii) of Article XVII (Appendix A, *infra*, p. 25a). Japan took the position that the offense was *not* one arising out of an act

done in the performance of official duty—because respondent's action in firing the shell cases was said to be outside of the scope of his guard duty—and that therefore Japan had the primary right to exercise criminal jurisdiction under Paragraph 3 (b) of Article XVII (Appendix A, *infra*, p. 25a).

The issue continued unresolved by the Joint Committee from early March until mid-May 1957, when the United States representatives on the Joint Committee were authorized to agree that Japan could exercise jurisdiction over respondent. It was agreed in the Joint Committee that United States military authorities would notify the appropriate Japanese authorities, in accordance with Paragraph 3 (c) of the Protocol amending Article XVII of the Administrative Agreement,[1] that the United States had decided not to exercise whatever jurisdiction it might have in the case. This action was thereafter taken. The certificate of official duty has not been withdrawn.

Respondent was indicted by Japan on May 18, 1957, for the offense of causing a death by wounding, the least serious homicide charge for which he could have been indicted under Japanese law.

The decision of the United States not to exercise jurisdiction over respondent and to agree that Japan

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[1] Paragraph 3 (c) provides (Appendix B, *infra*, p. 25a):

"If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

could exercise criminal jurisdiction over him was reviewed by the Secretary of Defense and the Secretary of State who concluded that it should be carried out. This decision was approved by the President. See the affidavit of Secretary of State Dulles, dated June 10, 1957, filed in the District Court, and a part of the record in this Court.[4] Public announcement of

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[4] The Secretary's affidavit states:

"* * * * * *

"3. Together with Charles E. Wilson, Secretary of Defense, I reviewed the facts with respect to a prior agreement of the Joint United States-Japan Committee established under the Security Treaty with Japan and the Administrative Agreement entered into thereunder, as amended, that petitioner Girard be tried in the courts of Japan for actions which caused the death of Naka Sakai, a Japanese national, on January 30, 1957. After such review and due consideration of the terms of the applicable Treaty and Agreement, Secretary Wilson and I concluded that the Joint Committee's agreement that Girard be tried in the courts of Japan was reached in full accord with procedures established by the Treaty and the Agreement. We decided that in order to preserve the integrity of the pledges of the United States, this determination should be carried out. In addition we concluded that any prolongation of the dispute over this jurisdictional issue might well have serious consequences upon United States relations not only with Japan, but also with many other nations.

"4. Because of the imperative public importance of the matter, this joint conclusion of the Secretary of State and the Secretary of Defense was discussed with and confirmed by the President. It was then communicated to the Government of Japan. Public announcement thereof was made and it has come to the attention of other governments with which the United States has agreements relating to the exercise of criminal jurisdiction over American forces.

"5. This case is widely regarded abroad as a test of this Government's willingness and ability to honor a national commitment openly arrived at, and duly confirmed by the Secretaries of State and Defense. This is of particular importance

this determination was made on June 4, and it was communicated to the Government of Japan.

On June 6, 1957, respondent filed this petition for a writ of habeas corpus in the District Court for the District of Columbia. On the same day that court entered an order directing petitioner Wilson and others to show cause why the writ should not issue. It was further ordered:

> * * * pending hearing and determination of this application that the person of the Petitioner, William S. Girard, be not delivered to custody or control of any foreign government or power.

Return and answer to the rule to show cause was filed on June 10, 1957, and on June 11 the District Court heard argument. The court ruled that there was no material fact in issue on the record as it stood. On June 18, 1957, the District Court issued its order deny-

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when the commitment relates to jurisdiction to try members of our armed forces for crimes committed within the sovereign jurisdiction of friendly nations—under agreements which are substantially more favorable to United States jurisdiction than generally recognized principles of international law with respect thereto.

* * * * *

"8. Because of the wide publicity that this proceeding has received, public opinion in Japan has been aroused. Any inability on the part of the United States officials concerned to honor this Government's commitment to permit Girard to be tried in the Japanese courts, particularly any such inability by reason of a temporary injunction or stay order pending final determination—will in my judgment give rise to serious difficulties in our relations with the Government and people of Japan and may involve risk of injury to United States personnel located in Japan."

ing the petition for habeas corpus but granting declaratory relief and issuing an injunction against petitioners from delivering respondent to the custody of the Japanese Government. Appendix B, *infra*, pp. 38a–51a. A notice of appeal was filed on June 18, 1957, and the record was docketed in the Court of Appeals on the same day. A petition for a writ of certiorari was filed by the Government on June 20, 1957, and was granted on June 21, 1957.

SUMMARY OF ARGUMENT

I

Under international law, which is part of the law of the United States, respondent has no immunity from Japanese criminal jurisdiction except that accorded him under the agreements between the United States and Japan. Apart from those agreements, respondent is wholly subject, under international law, to the jurisdiction of Japan on whose soil he performed the acts which are now charged as an offense against Japanese law.

A. 1. Under the only acceptable rule of international law—the only one recognized by sovereign nations—the territorial sovereign has plenary jurisdiction, and there is no immunity for visiting troops except to the extent that the local sovereign expressly or impliedly agrees. The right to exercise jurisdiction over such troops is a matter for negotiation between the two states. This is the position which the United States has accepted and which is overwhelmingly supported by international practice and court decisions. Therefore, unless respondent

can claim rights under the arrangement with Japa
(which we discuss in Point II, *infra*), he has no d
fense whatever against the exercise by Japan of i
jurisdiction.

2. The Court should confirm this rule of intern
tional law, adopted by the branches concerned wi
foreign affairs. In the area of foreign relations, t
uniform teaching of the Court's rulings is that t
judiciary should not go counter, if at all possible, to
definite position taken by the Executive *vis-à-vis* fo
eign countries. Here, the executive position is re
sonable and supportable; we believe it to be whol
correct. We submit that the court can accept it wit
out determining the issue for itself.

B. Respondent relies upon statements by vario
theorists to the effect that visiting friendly force
should be entitled to an immunity, but even the
statements do not support respondent's position in th
case. In the first place, it is universally agreed tha
whatever immunity might exist in the absence of sp
cific agreement, it can always be supplanted by
express agreement between the two sovereigns. Th
is the precise situation here. Japan and the Unit
States have agreed to an arrangement under whi
American troops do not have full immunity, and wh
immunity they have can be waived by the Unit
States. Respondent cannot, therefore, rely on a
principle of immunity under international law.

Secondly, it is also universally agreed that ev
expressly granted immunity—and *a fortiori* any i
munity arising by implication—is for the benefit

the state, not the individual, and it may always be waived by the state with or without the consent of the individual. The practice with respect to diplomats makes this clear *a fortiori;* diplomatic immunity may be, and has been, waived by the government over the objection of the diplomat. The same rule has been applied to servicemen. Accordingly, respondent—as to whom any immunity has been duly waived—has now no conceivable claim under international law.

II

By international arrangement with Japan, the United States has acquired a discretionary right to exercise criminal jurisdiction in that country in certain categories of cases, but in no case is United States jurisdiction mandatory and this country may always determine not to exercise its jurisdiction in favor of the jurisdiction of Japan. In respondent's case, the United States has duly decided not to exercise such jurisdiction as it may have had.

A. Our international arrangement with Japan is contained in three basic documents—the Security Treaty, the 1952 Administrative Agreement, and the 1953 Protocol amending the Administrative Agreement. The Security Treaty explicitly authorized (in Article III) the United States and Japan to enter into "administrative agreements" relating to the "conditions which shall govern the disposition of armed forces of the United States of America in and about Japan." The Administrative Agreement, drawn up and concluded under this provision of the Security Treaty, provided that, with

the coming into force of the NATO Status of Forces Treaty, the United States, at the option of Japan, would conclude with Japan an agreement on criminal jurisdiction similar to the corresponding provisions of the NATO Status of Forces Treaty. Pursuant to that obligation, and at the request of Japan, in 1953, a Protocol was concluded which amended the Administrative Agreement to incorporate the jurisdictional provisions of the NATO Status of Forces Treaty.

Under this arrangement, Japan and the United States have concurrent jurisdiction to try members of the United States Forces for conduct, as here, which constitutes an offense both under Japanese law and under the Uniform Code of Military Justice. Where the offense is one "arising out of any act or omission done in the performance of official duty," the United States is given the "primary" right to exercise jurisdiction; for offenses not arising out of an act done in the performance of official duty and not involving solely United States personnel or property, Japan retains the "primary" right to exercise jurisdiction. But it is specifically provided in Paragraph 3 (c) that the state having the primary right may decide not to exercise jurisdiction or may waive its jurisdiction; if that is done, the other state may conduct a trial and, if the defendant is found to have committed the alleged offense, may impose punishment. The state with primary jurisdiction is required to give "sympathetic consideration" to a request for waiver by the other state.

B. This international arrangement between the United States and Japan is valid and binding, both

under the authorization of the Japanese Security Treaty and under the President's powers as the organ of the United States in foreign relations and as commander-in-chief.

1. The authorization in Article III of the Security Treaty to conclude administrative agreements relating to the *conditions* governing the disposition of American troops in Japan provides full support for the instant arrangement on jurisdiction. The obvious aim of Article III was to permit subsidiary agreements on all the problems incident to the stationing of our troops in Japan, including taxation, use of facilities, and criminal jurisdiction. That has been the uniform construction of the treaty by both Japan and the United States.

In addition, the fact is that the 1952 Administrative Agreement had been drafted and was considered by the Senate before it consented to the Security Treaty; the Senate specifically rejected a reservation which would have prevented the Agreement from being put into effect without further Senate consent. Similarly, when the NATO Status of Forces Treaty was ratified, the Senate was fully aware that its terms would be automatically extended to Japan, if Japan so desired.

2. Furthermore, the international arrangement is valid as an exercise of the President's authority in the field of foreign affairs and as commander-in-chief. In Appendix C, *infra*, pp. 52a–69a, we discuss in detail the authority of the President to conclude agreements with foreign countries on appropriate subjects. The field of criminal jurisdiction over American

to be within the President's competence. Agreements comparable to the instant arrangement have in the past been concluded in peace time with Mexico (in 1882), and with Denmark and Great Britain (in 1941).

C. Paragraph 3 (c) of the agreement with Japan expressly provides that the state with "primary" jurisdiction may always waive it, and "shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance". It was under these explicit provisions of Paragraph 3 (c) that the United States determined to waive any right to exercise its jurisdiction, and to accede to Japan's request that that state exercise its own jurisdiction. This determination was confirmed by the Secretaries of State and Defense and by the President.

Paragraph 3 (c) is an integral part of the international arrangement and is identical in terms with Article VII of the NATO Status of Forces Treaty. To hold that the United States must exercise jurisdiction in all those instances in which it possesses "primary" jurisdiction would be wholly to nullify the waiver provisions of that paragraph—for they can apply only in those cases where a state *does* have primary jurisdiction—and to excise it from the agreement. It is under this paragraph that the Japanese authorities have waived their primary jurisdiction in 97% of the cases in which Japan has had such primary jurisdic-

tion.[5] If the paragraph is invalid or inoperative, no such reciprocity is likely to continue; the conditions of the arrangement would be drastically altered.

III

A. Having demonstrated (1) that Japan could try respondent in the absence of a treaty or agreement containing contrary provision, and (2) that Japan could agree to refrain from exercising its jurisdiction over United States nationals in specific cases, we reach the question whether there is a defect in the agreements here involved insofar as they leave room for the exercise of an executive discretion. More specifically, the question is whether American law poses an objection to Paragraph 3 (c) of the Protocol, under which the executive has waived whatever right to try respondent was accorded the United States under other provisions of the agreements.

Since the United States is, itself, a nation of multiple sovereignties, the waiver of jurisdictional prerogatives is a commonplace in our law. The federal government and the several states, and the individual states in their relations *inter sese*, have long cooperated to the end that each may effectively exercise jurisdiction within its own sphere. In *Ponzi* v. *Fessenden*, 258 U. S. 254, the petitioner was under sentence of a federal court and the United States had

[5] Taking all countries with a comparable international arrangement with this country, the waivers by the foreign states of their "primary" jurisdiction amounted to 73% of all the cases in the three-year period ending November 30, 1956.

the right to keep him in its exclusive custody until the completion of his jail term. Yet, this Court held that, even in the absence of express statutory authorization, the Attorney General could make the prisoner available to the State of Massachusetts for trial of alleged violations of state law. Emphasizing the vital need for "reciprocal comity" (p. 259), the Court declared (p. 260): "He [petitioner] should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it * * *. Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it." Similarly, the Court held in *Roberts* v. *Reilly*, 116 U. S. 80, a case involving interstate rendition, that the petitioner might not complain because Georgia chose to forego the right to charge him for the offense involved and to deliver him to New York, which had concurrent jurisdiction.

The same is true in cases involving international extradition. "It is, of course, within the discretion of the government upon which the demand is made to deliver up the prisoner, notwithstanding that a criminal prosecution is pending against him for a violation of its own laws." (1 Moore, *Extradition*, Sec. 369.) This discretion is the executive's, for while the courts

may determine (on application for *habeas corpus*) whether a treaty of extradition covers the case, once this is determined, the ultimate decision whether to issue an executive warrant to surrender or to refuse the request of the demanding state rests with the head of state.

The instant case is an *a fortiori* one. It does not involve rendition or extradition, but, rather, the act of making the accused available for trial in the country where he is now actually present and in which the alleged offense was committed.

In light of the international agreement, which expressly covers the subject of waiver, and the President's powers, both in the conduct of foreign affairs and as commander-in-chief, it seems plain that no congressional authorization is required. But if that were required, it, too, is present. The Uniform Code of Military Justice provides that the executive may make military personnel available for trial by civil authorities. This authorization applies both at home and abroad. Articles 5, 14, *supra*, p. 3.

B. The conduct of military and foreign affairs falls within the exclusive power of the political branches of our government. The decision to waive jurisdiction over respondent and to remit him to Japanese authorities is one intimately related to the conduct of these affairs. There are no judicial standards by which it can be tested. Like "decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, [it is] not open to judicial revision . . .." *Terlinden* v. *Ames*, 184 U. S. 270, 290.

C. Even if there were some room for limited judicial review, it would be clear that there has been no abuse of discretion. There had been prolonged dispute as to whether Japan or the United States had primary jurisdiction. Japan's views as to the meaning of "official duty", as used in the agreements, is not without support. There was further question as to whether a Japanese court did not have the right to make the determination of the question of whether the act done was in the performance of official duty. There were also other important considerations bearing upon the future administration of the agreement with Japan and of similar agreements with other nations. In no event may the decision be deemed unreasonable or capricious.

IV

Since this dispute relates to acts which took place on Japanese soil and which are the subject of an agreement between two sovereign nations, it must of course be resolved by reference to the well-established principles of international law which we discuss under Points I and II, *supra*. But the District Court, ignoring the specific terms of the agreement as well as the basic fact that the shooting took place in Japan, invoked principles of American federalism rather than those of international law and decided the case as if the events had taken place within an American state whose jurisdiction, of course, is subordinate to that of the national government.

The purpose for which resort was had by the court below to the analogy of federal-state relations was to

apply the supposed principle that a federal officer has a personal constitutional right to trial by the United States rather than by any other jurisdiction. However, even within the continental United States no such right exists. The cases relied upon by the District Court to establish the existence of such a right—such as *In Re Neagle*, 135 U. S. 1—turn on specific statutes, inapplicable to this case and designed to insure the supremacy of federal law under Article VI of the Constitution. Thus, where a federal officer is discharged from state custody or is held not to be subject to a state statute, the federal court often proceeds on the assumption that, because federal law is supreme, there can be no violation of state law if the act is performed pursuant to a federal duty. This reasoning is clearly inapplicable where an alleged crime takes place on territory of an entirely independent sovereign, for in such a case the characterization of the act by the foreign, not the American, law will be controlling.

In any event, it is clear that the *habeas corpus* statute held to authorize the discharge of the federal officer in the *Neagle* case is not predicated on any constitutional right personal to the officer. Discharge from state custody has repeatedly been held to rest in the discretion of the federal court, and it is only in an unusual circumstance that the officer is not required to present his claim of a federal defense in the state courts. Were a personal constitutional right in question, discharge would be mandatory, not discretionary.

Respondent therefore has no constitutional right to trial only by a federal court and, moreover, no ap-

plicable statute confers such right upon him. The statute which enables removal of prosecutions against members of the armed forces from state to federal courts, 28 U. S. C. 1442a, is inapplicable by its terms. There is no other legislation which requires that respondent be tried in an American forum, let alone a federal forum.

ARGUMENT

As we stated in our petition for certiorari, the position of the United States on the issues in this case is simple; it rests on the international aspects which the District Court has totally ignored. Under international law, Japan is sovereign within its own country. In the absence of express or implied agreement to the contrary, United States officials within Japan would be obliged to make respondent available to the Japanese authorities for trial there. Thus, if the international arrangements between the United States and Japan are invalid, respondent is plainly subject to the exclusive jurisdiction of Japan and has no claim whatever in American courts. And if, as we assert, the Security Treaty and implementing arrangements are valid, they indisputably authorize the United States, in cases where the jurisdiction of the United States and Japan is concurrent, to waive whatever jurisdiction it may have, including its so-called "primary" jurisdiction. This has been done in a decision approved by the highest executive officers of the Government. Such a waiver—or decision not to exercise jurisdiction—is not a justiciable issue to be decided by a court but a discretionary matter for the Executive Branch.

I

UNDER INTERNATIONAL LAW, RESPONDENT HAS NO IMMUNITY FROM JAPANESE CRIMINAL JURISDICTION EXCEPT THAT ACCORDED HIM UNDER THE AGREEMENTS BETWEEN THE UNITED STATES AND JAPAN

There is only one view of international law that has been accepted by sovereign states regarding the status of foreign troops visiting or passing through a friendly country. It is the rule that has been adopted by the United States and the other nations of the world. This rule is that in the absence of agreement, express or implied, each country has absolute sovereignty within its jurisdiction, and visiting troops have no immunity. It has been suggested by various theorists—whose views are not incorporated in the body of international law—that in the absence of agreement or qualification visiting foreign troops are immune from local jurisdiction for some or all offenses. But one thing is a matter of universal agreement, accepted even by these theorists—that the terms of any immunity from local jurisdiction will be governed by an express agreement entered into by the two countries, and immunity may be waived by the country of which the soldier is a national. Accordingly, respondent's susceptibility to Japanese jurisdiction is governed by the terms of the United States agreement with Japan, and any possible immunity is fully subject to waiver by the United States.

A. Under international law, which is a part of the law of the United States, visiting troops are subject to the unlimited jurisdiction of the local sovereign except to the extent that it expressly or impliedly agrees otherwise

1. The authoritative statement of the principles of international law applicable to respondent's claim of immunity is contained in Chief Justice Marshall's opinion in *The Schooner Exchange* v. *McFaddon*, 7 Cranch. 116, 136, 139:

> The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

See also *United States* v. *Flores*, 289 U. S. 137; *Wildenhus' Case*, 120 U. S. 1.[6]

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[6] *The Schooner Exchange* case has been misconstrued by some as supporting the proposition that there is an immunity under international law for visiting troops. The Court there held that, under the customs and conditions then prevailing, there was *implied* consent that an armed public vessel of a foreign

Following this principle, the United States has adopted the view that each sovereign country has absolute legal authority and criminal jurisdiction within its own territory, and that international law, in and of itself, does not confer any immunity on any group within the country, such as visiting troops of a friendly power. The NATO Status of Forces Agreement, T. I. A. S. 2992, and the instant arrangement with Japan were negotiated upon that basis. See the statement of the Attorney General, before the Senate Foreign Relations Committee, June 24, 1953, Supplementary Hearing before the Senate Foreign Relations Committee on the Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty, 83rd Cong., 1st Sess., pp. 38–56, 65–79, 89; 99 Cong. Rec. 8762–8770; Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 Columbia Law Rev. 1091 (1953). The Attorney General's study considers the various materials and concludes that under international law, as it has been practiced and applied by the nations of the world, friendly foreign forces are

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sovereign would be immune from the jurisdiction of the local courts. But the Court went on to state:

> Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. [7 Cranch at 146.]

Coleman v. *Tennessee*, 97 U. S. 509, and *Dow* v. *Johnson*, 100 U. S. 158, involving the status of soldiers who were members of a belligerent occupation force, and *Tucker* v. *Alexandroff*, 183 U. S. 424, involving the power of American officials under a treaty to arrest a deserter from a foreign navy, contain some overly broad general language but do not affect the holding or reasoning of *Schooner Exchange*.

not immune from the criminal jurisdiction of the state on whose territory they are stationed for crimes committed there against its laws.

We need not here set forth in detail the materials and decisions supporting the Government's view on this point.[7] A few instances will be indicative. The Brussels Treaty Powers Agreement of 1949, 22 Dept. of State Bull. 449–53 (1950), recognized the fullest possible jurisdiction of the host state over the military contingents of the visiting power. The British Allied Forces Act, 1940, 3 & 4 Geo. 6, c. 51 (1940) provided for no jurisdictional immunity for Allied forces on

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[7] See 1 Lauterpacht, Oppenheim's *International Law* (8th ed.) 848–849:

> However, the view which has the support of the bulk of practice is that in principle members of visiting forces are subject to the criminal jurisdiction of local courts, and that any derogations from that principle require specific agreement of the local State by treaty or otherwise.

The American Law Institute's Restatement of the Foreign Relations Law of the United States (Tentative Draft No. 1, April 26, 1957, sec. 18) adopts the same view of international law in providing that the taking of any enforcement action over a state's own troops within the territory of another state without the express or implied consent of that state is a violation of its rights.

See also: Barton, *Foreign Armed Forces: Immunity from Criminal Jurisdiction*, 27 Brit. Y. B. I. L. 186 [1950]; Re, *The NATO Status of Forces Agreement and International Law*, 50 Nw. U. L. Rev. 349; Note, *International Law and Friendly Foreign Forces*, 32 N. Y. U. L. Rev. 351.

British soil.[8] Congress has taken a like view in considering whether to grant immunity to foreign military personnel on American soil. The Senate Judiciary Committee, in reporting out the Service Courts of Friendly Foreign Forces Act, 58 Stat. 643, 22 U. S. C. 701–706, stated that any grant of power to foreign military courts was to be only "of a temporary and conditional nature," and that "The committee do not concede that any foreign military court has more than conditional jurisdiction while on our soil." S. Rep. 956, 78th Cong., 2d Sess., pp. 1, 2. Even this grant of jurisdiction was to be effective only upon a Presidential finding that its "powers and privileges" were necessary. At the time, Congress had before it the British legislation which provided that a member

[8] An exception was subsequently made in favor of American forces (United States of America Visiting Forces) Act, 1942, 5 & 6 Geo. 6, c. 31 (1942)), but the British government considered this to be a considerable departure from the traditional system and practice, tolerable only because of the exceptional circumstances created by the war. Sen. Rep. No. 956, 78th Cong., 2d Sess., p. 4; Barton, *Foreign Armed Forces: Immunity From Criminal Jurisdiction*, 27 Brit. Y. B. I. L. 186, 206 [1950].

In general, Great Britain, Canada, and Australia do not recognize implied immunities from their jurisdiction in favor of visiting friendly forces. British courts entertain criminal prosecutions against foreign service personnel even when the offenses occur aboard foreign armed vessels, *Chung Chi Cheung* v. *The King* [1939], A. C. 160, or in foreign military camps, *Rex* v. *Navratil*, Lauterpacht, *Ann. Dig. & Rep. Pub. Int. Law Cases*, 1919–1942 Supp., 161. Canada is of the same view. *Reference re Exemption of U. S. Forces from Canadian Criminal Law* [1943] 4 D. L. R. 11. Australia recognizes no exemption from civil jurisdiction and the same rule appears to extend to criminal jurisdiction. *Wright* v. *Cantrell*, 44 N. S. W. St. R. 45.

of the United States military or naval forces would be immune from criminal prosecution in British courts (unless the United States waived that immunity) (fn. 8, *supra*, p. 26). Senator Revercomb urged that the United States should grant reciprocal immunity to visiting forces. He asked that, at least as far as the federal courts were concerned, they should be divested of jurisdiction to the extent that the service courts had power to try them. 90 Cong. Rec. 6490–6498. The Congress was unwilling to grant or recognize any such immunity for visiting troops.

Japan, too, has expressly rejected any implied exemption of foreign forces from the jurisdiction of local tribunals. Prior to the conclusion of the Unified Command Agreement of June 11, 1954, T. I. A. S. 2995, a Japanese court tried two British sailors over protests by the British government (see N. Y. Times, Aug. 6, 1952, p. 1, col. 2); and the Japanese authorities granted a temporary immunity to United States forces only on condition that the NATO jurisdictional formula be substituted as soon as the latter became effective in Europe (see *infra*, p. 40).[9]

Under this view of international law, respondent is indubitably subject to the jurisdiction of Japan. He is and at all times since the alleged offense has been within Japanese territory. Except to the extent that Japan has consented otherwise, it has the exclusive right to define criminal offenses, to conduct trials, and

[9] As early as 1911, Japan tried and convicted a naval enlisted man who killed another enlisted man in a United States naval hospital ashore. II Hackworth, *Digest of International Law*, p. 422.

to impose punishment for the commission of offenses on its own soil.[10] Accordingly, respondent could have no claim whatever against the exercise of Japanese jurisdiction unless Japan has expressly or impliedly agreed not to exercise its jurisdiction.

There is plainly no question of implied immunity from Japanese jurisdiction for the respondent. The terms and conditions under which American forces remain in Japan have not been left to implication. They have been carefully worked out by treaty and implementing agreements which give the United States certain rights to exercise jurisdiction within Japan. Inherent to those rights was the agreement of the two sovereigns that the United States and Japan, respectively, in cases deemed important by the other, would give sympathetic consideration to a waiver of such rights—an agreement which in and of itself excludes any adoption of a rigid rule of non-waiver. In this case, that agreement has been implemented. Apart from the agreements (which are discussed in Point II, *infra*), petitioner has no implied or other exemption from Japanese criminal jurisdiction. If the treaty or agreements were non-existent or were deemed invalid, there would be no question but that the Japanese authorities could properly take respondent into custody and try him for the offense under Japanese law with which he has been charged. And

[10] The Japanese Peace Treaty explicitly recognizes full Japanese sovereignty "over Japan and its territorial waters" (App. A., *infra*, p. 5a). The preamble to the Treaty refers to the United States and Japan as "sovereign equals" (App. A, *infra*, p. 5a).

the courts of the United States would plainly have no authority to intervene. *Hirota* v. *MacArthur*, 338 U. S. 197; *Neely* v. *Henkel*, 180 U. S. 109, 123.[10a]

To appreciate the error of the District Court's treating the matter as one of domestic law one need only recognize that the jurisdiction of a United States court over a killing within the United States would be exclusive, under the Government's view of international law, unless covered by agreement; such jurisdiction could not possibly be defeated by the terms of the Japanese constitution or statutes. Certainly, a Japanese soldier who commits a crime on American soil and is about to be tried in our courts could not claim immunity from our jurisdiction by relying on Japanese law. For the purposes of United States territorial jurisdiction, the terms of the Japanese constitution and laws would be wholly irrelevant.

2. Where the Executive has thus taken a definite and formal position on a matter of international law, the courts should follow it if it is reasonably possible for them to do so. As this Court has so often declared and held, in the field of international affairs the judiciary should be slow to upset a view of the country's rights which, as here, both the executive and the legislative branches have adopted. "In such cases the judicial department of this government follows

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[10a] In *Neely* v. *Henkel*, the Court said (180 U. S. at 123):

"* * * When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States * * *."

the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." *United States* v. *Lee*, 106 U. S. 196, 209. The Court has insisted that American courts "should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35; *Ex parte Peru*, 318 U. S. 578, 588; see *National City Bank of New York* v. *Republic of China*, 348 U. S. 356, 361.

Accordingly, the courts accept as correct declarations and determinations with respect to foreign affairs and foreign policy, made by the Executive Branch by formal rulings or official action taken in conducting the foreign affairs or formulating the foreign policy of the nation. As the Court knows, this general principle of judicial abstention from the domain of foreign affairs has been consistently applied in various fields touching on this country's international relations. Even treaties from which private rights flow will normally not be interpreted contrary to a definite position taken by the Executive *vis-à-vis* a foreign country, especially where judicial intervention might well cause difficulties in the larger sphere of foreign relations. *E. g., Foster* v. *Neilson*, 2 Pet. 253, 307–309; *Williams* v. *Suffolk Insurance Co.*, 13 Pet. 415; *United States* v. *Reynes*, 9 How. 127, 153–155; *Charlton* v. *Kelly*, 229 U. S. 447, 468, 474–476; *Sullivan* v. *Kidd*, 254 U. S. 433, 442; *Factor* v. *Laubenheimer*, 290 U. S. 276, 295; cf. Jaffe, *Judicial Aspects of Foreign Relations* (1933), 71–78.

We know of no reason why the Court should depart from this principle when the issue involved is the

determination of the proper rule of international law binding this country as well as others. On the contrary, the rules of international law—governing the relationships of sovereign states—seem most appropriately subject to the principle that the courts should follow the political branches, if it is reasonably possible to do so. Since the position of the United States on the non-immunity under international law of visiting troops is plainly not unreasonable or unsupported, the Court can accept that position without deciding the matter for itself.[11]

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[11] None of the opinions in *Reid* v. *Covert*, No. 701, Oct. Term, 1955, and *Kinsella* v. *Krueger*, No. 713, Oct. Term, 1955, decided June 10, 1957, casts the slightest doubt on the plenary authority of the territorial sovereign over offenses committed on its soil. On the contrary, Mr. Justice Black's opinion expressly recognizes this plenary authority, apart from treaties and international agreements (slip op., pp. 13-14, fn. 29). The opinions of Mr. Justice Frankfurter and Mr. Justice Harlan also recognize, explicitly and implicitly, the dominant jurisdiction of the territorial sovereign.

The *Covert* and *Krueger* decisions are concerned solely with a situation where the *United States* seeks to try Americans abroad. The Court was not concerned with, and did not rule upon, the present situation where it is a foreign state which is seeking to try an American for conduct committed on its territory. For the latter situation, the intimations in all the opinions are, we believe, that nothing in the United States Constitution or laws prevents this country from fulfilling its obligations to a territorial sovereign like Japan.

B. Even the theorists relied on by respondent recognize that any immunity that visiting troops might possess is subject to limitation by international agreement and may always be waived by the government concerned

Certain writers have urged that under international law a state is obliged, when it agrees to friendly forces' entering its territory, to recognize that they are immune from local jurisdiction for some or all offenses. See, *e. g.*, King, *Jurisdiction over Friendly Foreign Armed Forces*, 36 Am. J. Int. Law 539; King, *Further Developments Concerning Jurisdiction Over Friendly Foreign Armed Forces*, 40. Am. J. Int. Law 257. On occasion during war, the United States has relied on this theory in an effort to obtain exclusive jurisdiction over members of its armed forces abroad. To many, this smacked of colonialism and an effort to revive the extraterritoriality of another century. Also, on further examination, this tentative view did not survive a canvass of prior international practice and of the basic theories of international law. For whatever reason, the fact is that no country was prepared to recognize an international obligation to grant extraterritorial rights to foreign soldiers. The United States itself, as pointed out above, has been unwilling to agree that foreign troops here shall be immune from the local courts. So far as is known, the theory of extraterritorial rights by international law is not now supported by any country.

But even this view held only by certain writers, which has been rejected by the United States and by the world, does not help respondent. For under this theory the immunity of visiting troops is always subject to definition and limitation by agreement between the two governments concerned, and is also subject to waiver by the government of the armed forces of which the soldier is a member. In this case, both events have taken place.

1. We discuss below the terms of the treaty and executive agreements under which United States troops are disposed in Japan. See Point II, *infra*, pp. 38–57. It is enough to point out here that even the most ardent advocates of immunity for visiting troops under international law recognize that the terms of that immunity and the limitations on it may be set by international agreement.[12] As we have already pointed out, in this case Japan has not remained silent. By agreement it has indicated the precise limits to the extraterritoriality which it is prepared to concede; and by the Security Treaty Japan and the United States have agreed that the conditions under which the troops are placed in Japan shall be governed by agreement. There is no room for an

[12] "It is, however, clearly permissible, and in many cases highly desirable, to have an express agreement on the subject rather than for the matter to be left to implication." "It may be concluded, however, that *in the absence of an agreement providing otherwise*, * * * the exemption of visiting forces from the jurisdiction of local courts * * * exists at all times and in all places * * *" [emphasis added]. King, *Jurisdiction over Friendly Foreign Armed Forces*, 36 Am. J. Int. Law 539, 549, 561.

implied extraterritoriality greater than that which has been made express. Even if there were an initial immunity under international law, it has been superseded by the specific agreements between Japan and the United States.

2. A final and conclusive answer to respondent's contentions based upon international law is that whatever immunity he might have is subject to waiver by his government. In the case of *Chung Chi Cheung* v. *The King* [1939], A. C. 160, 176, the Privy Council considered the immunity of a member of the crew of a foreign armed public ship, and held that it was subject to waiver by the defendant's government. It was there said:

> But if the principles which their Lordships have been discussing are accepted, the immunities which the local Courts recognize flow from a waiver by the local sovereign of his full territorial jurisdiction, and can themselves be waived. The strongest instances of such waiver are the not infrequent cases where a sovereign has, as it is said, submitted to the jurisdiction of a foreign Court over his rights of property. * * * But a sovereign may say, you have waived your jurisdiction in certain cases, but I prefer in this case that you should exercise it. The original jurisdiction in such a case flows afresh.

The same holding was made by the Mixed Court of Cassation in Egypt in the case of *Gouvaris* v. *Ministère Public* in 1943.[13] There, where an allegedly

[13] See Lauterpacht, *Ann. Dig. and Rep. of Public Int. Law Cases*, 1943–1945, p. 152.

on-duty offense was involved, the court held that any immunity could be waived expressly or impliedly by the soldier's commander—the immunity was not for the convenience of the particular individual.[14] This has been the official position of the United States. Both the *Manual for Courts-Martial* of 1949 (par. 11, p. 11) and the *Manual for Courts-Martial* of 1951 (par. 12, pp. 16–17), issued by the President, provide that the jurisdiction which the United States retains over members of its armed forces abroad—

> * * * may be waived by the visiting sovereign and is not a right of the individual concerned.

Thus, any immunity which respondent can claim applies to him not in his individual capacity but because of his connection with the Government of the United States. At best, he partakes of some small share of the sovereign immunity of the United States. His very contention that the offense arose in the performance of official duty and that thereby he has an immunity from local jurisdiction demonstrates that he is not asserting an individual and personal right but rather claiming the benefit of his connections with his government. But the immunity of any official of the government, and the sovereign immunity of the Government itself, is subject to waiver by the Government.

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[14] Prof. Charles Cheney Hyde writes: "Members of the force who there commit offenses are dealt with by the military or other authorities of the State to whose service they belong, *unless the offenders are voluntarily given up.*" 1 Hyde, *International Law* (2d rev. ed.), Sec. 247. [Emphasis added.]

No one can contend that international law confers a greater immunity on a visiting soldier than it does on a diplomat. In each case the immunity (if it exists) would bar the local courts from asserting jurisdiction over an official of a foreign government who is stationed there under orders from his sovereign. But it is clear that diplomatic immunity is to protect the sovereign's interests, and may be waived by the sovereign whenever it sees fit, without the consent of the individual. See *Davis* v. *Packard*, 7 Pet. 276, 284; *Börs* v. *Preston*, 111 U. S. 252; 256; *Ex parte Gruber*, 269 U. S. 302. The Comment to the Draft Convention on Diplomatic Privileges and Immunities (26 Am. J. Int. Law, Supp., 125, 128 (1932)) points out that a member of a mission may not challenge a waiver of his immunity made by his government. This has been made explicit in some recent international agreements. See, *e. g.*, Section 20 of Article V to the convention between the United Nations and the United States (Feb. 1946), and Article 22 of the Agreement relating to the Status of the North Atlantic Treaty Organization, T. I. A. S. 2992:

> "Privileges and immunities are granted to officials and experts in the interests of the Organisation and not for the personal benefit of the individuals themselves. The Chairman of the Council Deputies shall have the right and the duty to waive the immunity of any official or expert in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the Organisation."

Waivers of diplomatic immunity are not uncommon in international practice. 1 Lauterpacht, Oppenheim's *International Law* (8th ed), 800–813. The United States has waived the immunity of its diplomatic personnel in both civil cases, IV Hackworth, *Digest of International Law*, p. 546, and in criminal cases, *e. g.*, *A Report on the Case of Tyler Kent*, 11 Dept. of State Bull. 243. The *Kent* case is particularly applicable here. Kent was a member of the Foreign Service assigned to the American Embassy in London. While stationed there and within the embassy he allegedly stole documents to which he had access in the course of his duties and passed them to unauthorized persons. The United States Ambassador granted a British request that Kent's diplomatic immunity be waived. Kent was then tried and convicted in the London Central Criminal Court for the larcenies committed in the American Embassy and for violation of the British Official Secrets Act.[14a]

In short, it is indisputable that the immunities of a United States soldier in Japan are governed by the terms of the international agreement between the two countries; and any immunity from local jurisdiction which a soldier might have under international law or by agreement is for the benefit of the United States and is subject to waiver by the United States. What respondent asserts is that there is an international right to be a fugitive from Japanese justice in Japan for conduct committed there. There is no support for such a position.

[14a] This Court denied leave to file a petition for mandamus in his behalf after his conviction. *Ex parte Kent*, 323 U. S. 672.

II

BY INTERNATIONAL ARRANGEMENT, THE UNITED STATES HAS VALIDLY ACQUIRED A DISCRETIONARY RIGHT TO EXERCISE CRIMINAL JURISDICTION IN JAPAN IN CERTAIN CATEGORIES OF CASES, BUT IN NO CASE IS SUCH JURISDICTION MANDATORY AND THE UNITED STATES MAY ALWAYS DECLINE TO EXERCISE ITS JURISDICTION IN FAVOR OF THE JURISDICTION OF JAPAN

Three basic documents govern the terms under which the United States is allowed to deploy troops within Japan and to exercise criminal jurisdiction over them. These are (1) the Security Treaty, (2) the Administrative Agreement under Article III of the Security Treaty, and (3) the Protocol to Amend Article XVII of the Administrative Agreement. Under these agreements, Japan and the United States have concurrent jurisdiction to try members of the United States forces for conduct, as here, which constitutes an offense both under Japanese law and under the Uniform Code of Military Justice. Where the offense is one "arising out of any act or omission done in the performance of official duty", the United States is given the "primary" right to exercise jurisdiction. In the case of offenses not arising out of an act done in the performance of official duty, Japan retains the "primary" right to exercise jurisdiction (if non-Americans are involved). But if the state having the primary right "decides not to exercise jurisdiction" the other state may do so—that is, it may conduct a trial and, if the defendant is found to have committed the alleged offense, may impose punishment.

As we have shown in Point I, *supra*, if these inter-

national arrangements between Japan and the United States are invalid, Japan has exclusive jurisdiction over all offenses within its territory, and a United States court should not order officials to try to defeat it. See *Neely* v. *Henkel*, 180 U. S. 109. The question of the validity of the agreements under which the United States has chosen not to exercise jurisdiction over respondent may thus not be relevant. Nevertheless, as respondent argues otherwise and the Court may deem the matter pertinent, we discuss that issue. It is the Government's position that there is no doubt that (*a*) the international arrangement is fully valid and binding on the United States, and (*b*) the United States may validly decline to exercise jurisdiction in a particular case, even though United States jurisdiction in that case is "primary" under the international arrangement.

A. The contents of the international arrangement

1. *The Security Treaty.*—The Security Treaty with Japan (T. I. A. S. 2491) was signed and ratified concurrently with the Treaty of Peace with Japan (T. I. A. S. 2490). See Appendix A, *infra*, pp. 7a–11a. Under Article I, Japan granted to the United States and the United States accepted the right to dispose armed forces in and about Japan. Article III provided (Appendix A, *infra*, p. 11a):

> The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments.

The Security Treaty thus provides the basic framework but none of the terms relating to the exercise of criminal jurisdiction.

2. *The Administrative Agreement.*—The Security Treaty was signed on September 8, 1951. Before it was ratified, an Administrative Agreement under Article III of the Treaty *supra,* was signed on behalf of the United States on February 28, 1952. It came into force on April 28, 1952. (Appendix A, *infra,* pp. 13a–29a.)

Substantively, three provisions of the Administrative Agreement bear on this case. Under Article XVII, Paragraph 2, it was agreed that, "[p]ending the coming into force with respect to the United States of the North Atlantic Treaty Agreement" on status of forces, the United States military courts and authorities in Japan should have exclusive jurisdiction in Japan over all offenses by military personnel; but it was also provided that "[s]uch jurisdiction may in any case be waived by the United States." Under Paragraph 1 of Article XVII, the United States committed itself to conclude with Japan, at Japan's request, an agreement on criminal jurisdiction similar to the corresponding provisions of the NATO Status of Forces Treaty when that treaty came into effect. And under Article XXVI of the Administrative Agreement, there was established a Joint Committee as the means for consultation on all matters requiring mutual consultation regarding the implementation of the Agreement. That Article also provides that if the Joint Committee is unable to resolve any matter it shall refer it to the respec-

tive governments for further consideration through appropriate channels.

3. *Protocol.*—Following the coming into effect of the NATO Status of Forces Treaty, the United States concluded with Japan; at its request and in compliance with the obligation of the United States under the Administrative Agreement, a Protocol to Amend Article XVII of the Administrative Agreement so as to bring it in accord with the NATO Treaty. (Appendix A, *infra,* pp. 23a–28a.)

This Protocol provides the substantive agreement under which the United States is now allowed to exercise criminal jurisdiction over offenses in Japan—an agreement which is the same as that which this country now has with the countries which have agreed to the NATO Status of Forces Treaty. The agreement is that in regard to criminal jurisdiction over American military personnel in Japan (1) United States military authorities shall have *exclusive* jurisdiction over offenses which are punishable by American but not by Japanese law; (2) Japanese authorities shall have *exclusive* jurisdiction over offenses punishable by Japanese but not by American law; (3) where "the right to exercise jurisdiction is concurrent," American military authorities shall have *primary* jurisdiction in relation to offenses against the property or the security of the United States, the property or the person of other members of the American armed forces, its civilian component, and dependents, and offenses "arising out of any act or omission done in the performance of official duty"; the Japanese authorities shall have *primary* jurisdiction over all other

offenses. The Protocol further provides in Paragraph 3 (c) that (Appendix A, *infra*, p. 25a):

> If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

It was under this provision of Paragraph 3 (c)—which explicitly provides that "primary" jurisdiction may be waived—that the United States determined to waive any right to exercise its jurisdiction, and to accede to Japan's request that that state exercise its own jurisdiction. This determination was confirmed by the Secretaries of State and Defense and by the President. See the Statement, *supra*, pp. 7–8.

B. The international arrangement is valid and binding

1. *The jurisdictional agreements were authorized by the Security Treaty.*—As we have pointed out, Article III of the Security Treaty specifically authorizes administrative agreements between the two governments:

> The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments.

Respondent makes two arguments to show that this Article did not actually authorize the executive agreements governing criminal jurisdiction over United States troops in Japan. The *first* is that the Treaty only authorized agreements dealing with the "disposition" of troops—that is, dealing with the places in which troops were to be stationed—and did not authorize any agreement with respect to jurisdiction over troops. Such a strained and restricted construction of Article III is clearly erroneous. The basic right which the United States acquired under Article I of the Security treaty is "to dispose * * * forces in and about Japan." Article III provides that "The *conditions* which shall govern the disposition of armed forces * * *" shall be determined by agreements. Obviously, the agreements were to cover the *conditions* under which the troops were to be disposed, and were not limited to the places where they were to be located or to the number of troops to be stationed at a place. Any other construction would have meant that none of the inevitable problems, such as taxation, customs, use of power facilities, etc., let alone jurisdiction, could have been covered by agreement. Article III would have had only minimal coverage, and there would be large, unexplainable gaps in the provisions made by the two nations for the stationing of American troops in Japan.

Above all, of course, is the crucial fact that both nations, contemporaneously with the making of the Security Treaty, construed Article III in the sense we have indicated. Their representatives promptly

sat down and worked out the elaborate Administrative Agreement (T. I. A. S. 2492; excerpts in Appendix A, *infra*, pp. 13a–19a) covering all the conditions governing the armed forces disposed in Japan. This concordance between the two parties' spontaneous practical construction of the Treaty and our own Government's position has the greatest of weight. See, *e. g.*, *Factor* v. *Laubenheimer*, 290 U. S. 276, 295; *supra*, p. 30.

Respondent's *second* argument is that the United States Senate, in approving the Security Treaty, did not intend to authorize the executive to conclude an administrative agreement which would allow the waiver of court-martial jurisdiction over United States soldiers for offenses committed within Japan. An examination of the pertinent history proves otherwise.

The Senate, in approving the Security Treaty, understood that Article III authorized an executive agreement which would deal with criminal jurisdiction over military personnel. The 1952 Administrative Agreement (*supra*, pp. 40–41), already signed, was before the Senate during the debates on the ratification of the Treaty. 98 Cong. Rec. 2376–2381.[15] This agreement provided, as already noted, that upon the coming into force of the NATO Status of Forces Treaty the United States would at the option of Japan conclude with Japan an agreement on criminal juris-

[15] The signing of the Administrative Agreement had been specifically authorized by the President. See Hearings before the House Committee on Foreign Affairs on H. J. Res. 309, 84th Cong., 2d Sess., pt. 2, at p. 559.

diction similar to the corresponding provisions of the NATO agreement. In the meantime, the United States was to have exclusive jurisdiction over all offenses committed in Japan by members of the United States armed forces; but there was also the express provision that "[s]uch jurisdiction may in any case be waived by the United States." (Appendix A, *infra*, p. 18a.) The full text of the Administrative Agreement was printed in the body of the Congressional Record on March 17, 1952, and again on March 20, 1952 (98 Cong. Rec. 2376, 2555).

In the course of the debate, Senator Jenner introduced a reservation to the Security Treaty to the effect that, since Congress had the sole power to declare war and authorize employment of the armed forces, any administrative agreements under Article III of the Treaty were to be void insofar as the United States was concerned unless ratified by the Senate as a treaty or otherwise approved by the Congress. 98 Cong. Rec. 2596.[16] This reservation was rejected by a vote of 45–22. 98 Cong. Rec. 2604. And the question of criminal jurisdiction was the one problem taken up by Senator Sparkman, in support of the Security Treaty, as an example of what would b covered by an admin-

[16] This proposed reservation stemmed not from concern over "the legal status of military and civilian personnel at our bases" but from fear of executive exercise of the war-making power. 98 Cong. Rec. 2367.

istrative agreement, and as a reason to oppose the proposed reservation of Senator Jenner.[17]

Similarly, the Senate was fully cognizant when it approved the NATO Status of Forces Treaty that such approval entailed adoption of the same formula

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[17] [Senator Sparkman:] "I believe that one of the reservations which have been proposed by the able Senator from Indiana [Mr. Jenner] relates to an administrative agreement, not requiring action by Congress.

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"Mr. President, it is article III of the security treaty between the United States and Japan which makes reference to these administrative agreements, and I desire to read it:

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"Mr. President, I shall mention one problem that we know will be subject to change and will have to be worked out under an administrative agreement. I refer to a problem which the Presiding Officer, Mr. Smith of North Carolina, who has been president of the American Bar Association, will readily recognize as being a real one. It is the subject of extraterritoriality with reference to criminal offenses committed by our forces in Japan. Who shall try them? What law shall be applied?

"It is a difficult problem to solve anywhere, particularly as between the West and the East, because our respective backgrounds and traditions and legal principles differ so greatly.

"Finally, this agreement was reached, and I believe everyone will concede that it was a wise solution of the problem, namely, that for the time being American forces will retain jurisdiction over our men when they commit offenses, but when the agreement which we draw up with reference to our forces in the NATO countries is agreed to or comes into being that agreement shall be applied. I have not tried to give the exact wording, but in substance, that is the agreement. It takes into consideration that changes may take place and, indeed, are anticipated.

"I believe the Senate will recognize the wisdom of making it an administrative or executive agreement and not requiring its ratification by the Senate or its approval by the Congress as a whole." [98 Cong. Rec. 2371-2372.]

for Japan by administrative agreement. During the hearings before the Senate Foreign Relations Committee on the NATO Treaty it was noted on numerous occasions that the United States was under commitment, by virtue of Article XVII of the Agreement with Japan (*supra*, p. 40), to apply the NATO jurisdictional formula to Japan. See the statement by Senator Smith of New Jersey (Supplementary Hearing before the Senate Foreign Relations Committee on the Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty, 83rd Cong., 1st Sess., p. 64); colloquy between Senator Wiley, Chairman of the Committee, and Mr. Phleger, Legal Adviser to the Department of State (Hearings, p. 78); statement by Hon. Walter Bedell Smith, Under Secretary of State (Hearings, p. 5); and see also, Hearings, pp. 15, 24, and Supplementary Hearing, p. 83.

It is thus apparent that both the original Administrative Agreement of 1952 and the 1953 Protocol (extending the NATO formula to Japan) were authorized by the Security Treaty and the NATO Status of Forces Treaty. Of the constitutional validity of such executive agreements, authorized by a treaty, there can be no doubt.[18] American history is filled with instances of agreements entered into by the executive pursuant to authorization by the Senate (in a treaty) or by the Congress (through legislation), and the constitutional foundation for such authorized agree-

[18] The general validity of the international arrangement with Japan appears to have been upheld by the Court of Appeals for the District of Columbia Circuit, in 1956, in *Cozart* v. *Wilson*, 236 F. 2d 732, vacated as moot, 352 U. S. 884.

ments is well established. See the detailed discussion, in Appendix C, *infra*, pp. 52a–69a, especially pp. 63a. *ff*. of the powers of the executive to conclude international agreements short of treaties.

2. *The Administrative Agreement and the Protocol are also valid as exercises of the President's power in the field of foreign affairs and as commander-in-chief.*—The validity of the Administrative Agreement and the Protocol, under the Japanese Security and NATO Status of Forces Treaties, is so clear that it is unnecessary to seek other support for the international arrangement involved in this case. But we may point out that, even if the specific provisions of the two treaties are put to one side, there is historical basis for the agreements in the Presidential conduct of foreign affairs and in the President's role as commander-in-chief.

Appendix C, *infra*, pp. 52a–69a, collects materials on the plenary foreign relations power of the United States, on the President's position in the conduct of foreign affairs, and on the relationship between the treaty clause of the Constitution and executive agreements. That discussion makes clear the significant role of the President, and his authority to conclude agreements with foreign countries in certain fields. The field of criminal jurisdiction over American troops stationed or visiting in a friendly foreign country would seem to be such an area in which the

President can properly act.[19] Questions have been raised in the past as to the extent of the right of the President to send troops into certain foreign countries, although this has frequently been done; but certainly there can be no doubt that the President has a large measure of authority to order military personnel to visit a friendly state. In such a case, rather than leave jurisdictional questions open to future controversy, it would be appropriate for the President, particularly as commander-in-chief, to work out the division of criminal jurisdiction by agreement, if possible.

There are instances in which that has been done. In 1882, an executive agreement was made between the United States and Mexico providing for the reciprocal right to pursue savage Indians across the border. The agreement contained clauses dealing with criminal jurisdiction.[20] The Final Protocol at the close

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[19] President Lincoln appeared to regard the matter of jurisdiction over American troops abroad as appropriate for executive consideration. In the code of rules he issued in April 1863, to govern the conduct in the field of the armies of the United States, it was provided that "Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred." Sec. II, Art. 47, General Orders No. 100, War Dept., April 24, 1863. (This was the so-called Leiber Code).

[20] These clauses (*Foreign Relations of the United States*, 1882, p. 397) were as follows:

ARTICLE VI

The abuses which may be committed by the forces which cross into the territory of the other nation shall be punished by the government to which the forces belong, according to

of the Boxer Rebellion, by which the United States and other powers acquired exclusive jurisdiction over part of Peking, was an executive agreement.[21] In 1941, the United States by executive agreement with Denmark obtained permission to place United States troops in Greenland. Under the agreement, the United States acquired exclusive jurisdiction over certain defense areas in Greenland, and exclusive jurisdiction over personnel other than Danish citizens and native Greenlanders within those areas. This agreement contained a "waiver" provision not unlike that in the current arrangement with Japan:

> * * * it being understood, however, that the Government of the United States may turn over to the Danish authorities in Greenland for trial and punishment any person committing an offense within a defense area, if the Government of the United States shall decide not to exercise jurisdiction in such case.[22]

Also during 1941 and prior to the entry of the United States into World War II, executive agreements were concluded covering the disposition of

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the gravity of the offense and in conformity to its laws, as if the abuses had been committed in its own territory, the said government being further under obligation to withdraw the guilty parties from the frontier.

ARTICLE VII

In the case of offenses which may be committed by the inhabitants of the one country against the foreign forces which may be within its limits, the government of said country shall only be responsible to the government of the other for denial of justice in the punishment of the guilty.

[21] *Foreign Relations of the United States*, 1901, App. p. 312.

[22] Executive Agreement Series No. 204, April 9, 1941, Art. VI.

troops in Iceland[23] and on the Leased Bases. This latter agreement contained detailed provisions giving the United States "the absolute right in the first instance to assume and exercise jurisdiction with respect to" certain offenses. It went on to declare, in a "waiver" provision:

> If the United States shall elect not to assume and exercise such jurisdiction the United States Authorities shall * * * so inform the Government of the Territory and shall, if it shall be agreed between the Government of the Territory and the United States Authorities that the alleged offender should be brought to trial, surrender him to the appropriate authority in the Territory for that purpose.[24]

Jurisdictional arrangements over United States military personnel in foreign countries have thus been historically recognized as an appropriate subject for executive agreements. In fact, where the United States is receiving rights from a foreign country which it would not have in the absence of agreement, the need for a formal treaty seems small. The grants of discretionary jurisdiction to the United States could be made by unilateral declaration by the host government. This demonstrates a key difference between the jurisdictional arrangements in Japan, made by executive agreement, and those with the NATO countries, made by treaty. With respect to the NATO countries, the obligations are reciprocal. NATO troops within the United States are governed

[23] Executive Agreement Series No. 232, July 1, 1941.

[24] Executive Agreement Series, No. 235, March 27, 1941, Art. IV.

by the NATO Status of Forces Treaty. Under this treaty the United States did not merely acquire rights to exercise jurisdiction overseas, but gave to other countries the right to exercise criminal jurisdiction in the United States. The jurisdiction of federal and state courts was diminished.[24a]

C. The exercise of jurisdiction by the United States is always discretionary and never mandatory, and where the United States chooses not to exercise its jurisdiction it must, under the international arrangement, allow Japan to proceed

It is clear that the right which the United States has under the Security Treaty, the Administrative Agreement, and the Protocol to exercise criminal jurisdiction within Japan over United States military personnel is neither exclusive nor mandatory. The Protocol specifically provides that both countries have

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[24a] Indeed, that the decision not to exercise jurisdiction over military forces is a proper subject for executive direction is an implicit holding of the *Schooner Exchange* case itself. The Court there held that the United States Attorney could properly indicate to the court the status of the ship, and pointed out that "without doubt, the sovereign of the place is capable of destroying" the implied immunity. If respondent were correct that it would be unconstitutional not to exercise jurisdiction over him which the United States could exercise, it would follow that the United States would have been required to exercise jurisdiction over the *Exchange* at the request of McFaddon and the others. If the United States can thus waive jurisdiction impliedly, it can do so by waiving it expressly. And if the United States through executive discretion can waive the jurisdiction of an American court in the United States, it is surely not constitutionally bound to assert such jurisdiction abroad.

jurisdiction over United States personnel in Japan (Appendix, *infra*, pp. 23a–24a):

> (a) the military authorities of the United States shall have the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States;
>
> (b) the authorities of Japan shall have jurisdiction over the members of the United States armed forces, the civilian component, and their dependents, with respect to offenses committed within the territory of Japan and punishable by the law of Japan.

The only occasion on which either government has exclusive jurisdiction is with respect to offenses which are punishable solely by its law. The United States, for example, would have exclusive jurisdiction over the offense of sleeping on duty, which presumably would not violate any Japanese law.

Where jurisdiction is concurrent, as it is in every case where the conduct may be in violation of the law of the United States and of Japan, the arrangement provides which country shall have the primary right to exercise jurisdiction. Under Paragraph 3 (a) (Appendix, *infra*, pp. 24a–25a), the military authorities of the United States have the primary right to exercise jurisdiction over members of the United States armed forces in relation to—

> (ii) offenses arising out of any act or omission done in the performance of official duty.

Thus, assuming that respondent's act of shooting Mrs. Naka Sakai was done in the perform-

ance of official duty, the military authorities of the United States had the primary right to exercise jurisdiction over him. But, as we have emphasized, this primary right is not mandatory or absolute. It is only primary, and its exercise is discretionary. Paragraph 3 (c) specifically provides that the state having primary jurisdiction may decide not to exercise its right, and if it makes that determination to notify the other state as soon as practicable. See *supra*, pp. 41–2, and Appendix A, *infra*, p. 25a.

Under Paragraph 3 (c), it is not only provided that the United State may choose not to exercise its primary jurisdiction but also the United States is obligated to give sympathetic consideration to a request from Japan to waive jurisdiction. The United States could not in good faith enter into such an arrangement unless it was in a position to waive jurisdiction in a case which it thought appropriate. The agreement to give sympathetic consideration to a request requires the ability to grant that request. To hold that the United States *must* exercise jurisdiction in all those instances in which it possesses primary jurisdiction would be to nullify the waiver provisions of Paragraph 3 (c), for they apply only in those cases where a state *does* have primary jurisdiction. It is under this paragraph that the Japanese authorities have waived their primary jurisdiction in 97% of the cases in which Japan has had such primary jurisdiction, and that foreign governments operating under like provisions have waived their primary

jurisdiction in about 73% of all the cases.[25] If Paragraph 3 (c) is excised from the international agreement as invalid or inoperative, no such reciprocity is likely to continue. And the willingness of foreign countries to receive American troops would undoubtedly be diminished—at the very least. The "waiver" provisions are an integral and significant part of the international arrangements providing for jurisdiction over American servicemen stationed abroad. The terms with Japan are identical to those which have been approved by treaty for all NATO countries.

It should be noted, finally, that Paragraph 3 (c), quoted above at p. 42, contains two sentences which provide different ways in which the United States may decline to exercise its primary jurisdiction. First, the United States may simply decide not to exercise jurisdiction, leaving the way open for Japan to exercise its concurrent jurisdiction if it wishes to do so. The second method, different in form if not in substance, is a "waiver" of jurisdiction. Here, the affirmative act of waiving jurisdiction is taken in response to a request by the other government. Although a unilateral decision not to exercise jurisdic-

[25] According to the records maintained by the Department of Defense, during the three-year period ending November 30, 1956, over 32,000 cases involving personnel of the Department of Defense arose which were subject to the primary jurisdiction of foreign courts. As stated in the text, through the application of waiver provisions such as Paragraph 3 (c) foreign governments waived their jurisdiction in about 73% of all the cases. During the year ending November 30, 1956, the Japanese Government waived its primary jurisdiction in over 5400 cases involving American military personnel—an average of over 100 a week.

tion is also frequently referred to as a "waiver" of jurisdiction, a waiver in response to the request of the other state embodies the significant element that the other nation is directly and immediately interested—is, in fact, an active participant and not merely a bystander. Its direct interest demonstrates that the transaction is truly one between two sovereign countries and is not merely the unilateral act of American officials.

We conclude that the Security Treaty and the two executive agreements negotiated under it are valid, and that they give the United States a discretionary right to exercise jurisdiction over respondent if the offense arose from an act done in the performance of official duty, but that they do not compel the exercise of American jurisdiction. The United States, in a decision approved by its highest executive officers, has decided not to exercise this jurisdiction. Under the agreements, Japan explicitly retained the right, under these circumstances, to exercise its sovereign jurisdiction over offenses against Japanese law committed within its territory. Accordingly, respondent has no rights under the international arrangement which he can assert in this forum.

The only remaining argument which respondent would appear to assert is that, though the treaty arrangements may be valid, under the Constitution the decision whether to exercise United States jurisdiction cannot be left to executive discretion, but must be de-

cided by Congress or the courts. We turn to this issue.[26]

III

UNDER THE CONSTITUTION, THE EXECUTIVE MAY PROPERLY BE ALLOWED DISCRETION TO PROSECUTE RESPONDENT WITHIN THE FEDERAL JURISDICTION OR TO MAKE HIM AVAILABLE FOR PROSECUTION BY JAPAN

A. The courts have recognized that decisions as to which jurisdiction is to try a defendant may be left to executive discretion

1. As we have argued above, in the absence of an agreement or treaty containing contrary provision, Japan could try respondent for an offense against Japanese law committed on Japanese soil. Japan, of course, could enter an agreement with the United States (or other sovereign nation) to refrain from exercising jurisdiction over the latter's nationals in specified cases. See *supra*, pp. 22 *et seq.* The question remains whether such an inter-governmental agreement is any the less valid because it incorporates an element of flexibility, or, otherwise stated, because there is an area in which there is provision for the exercise of executive discretion. More specifically, is there, from the standpoint of American

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[26] Respondent explicitly disavowed, in the District Court, any contention that his trial by Japan would be unfair or unjust. Accordingly, we do not stop to point out the procedural safeguards in the Japanese trials of American servicemen, or detail the experience which proves that no unfairness is to be anticipated. See *Reid* v. *Covert*, No. 701, Oct. Term, 1955, decided June 10, 1957, slip op., p. 13–14, fn. 29 (opinion of Mr. Justice Black); Note, *Criminal Jurisdiction over American Armed Forces Abroad*, 70 Harv. L. Rev. 1043 (April 1957).

law, a legal or constitutional objection to Paragraph 3 (c), which provides for a waiver or declination of jurisdiction by the United States authorities?

Since the United States is, itself, a nation of multiple sovereignties, it is hardly surprising that American decisional law provides a ready answer. In the conduct of relations between the United States and one of the constituent states, or between the states, it has long been settled that there is power and discretion on the part of the appropriate governmental officials to practice that comity upon which the harmonious operation of a federal government so largely depends. The Attorney General of the United States is thus authorized, even without specific statute, to waive the right of the federal government to the continued and exclusive custody of one who has been charged with (or convicted of) a violation of federal law and to make him available to state authorities so that he may answer a charge of violation of state law. *Ponzi* v. *Fessenden*, 258 U. S. 254. The same is no less true where a state has obtained initial custody and the request that the prisoner be made available for prosecution emanates from the United States[27] or from another state.[28]

In the *Ponzi* case, the petitioner had pleaded guilty to a federal offense and was serving a five-year sentence. He was thus in the exclusive custody of the

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[27] *Zerbst* v. *McPike*, 97 F. 2d 253 (C. A. 5); *Gunton* v. *Squier*, 185 F. 2d 470 (C. A. 9); *Lunsford* v. *Hudspeth*, 126 F. 2d 653 (C. A. 10).

[28] *Roberts* v. *Reilly*, 116 U. S. 80; *People* v. *Klinger*, 319 Ill. 275, 149 N. E. 799; *State* v. *Saunders*, 288 Mo. 640, 232 S. W. 973; 42 A. L. R. 585, Annotation, and cases there cited.

United States, which had an undoubted right to retain him until the completion of his term. 258 U. S. at 260–261. The question was whether, in these circumstances, the Attorney General could consent to Massachusetts' request (made in the form of a writ of *habeas corpus ad prosequendum*[28] addressed to the federal agent charged with custody of the prisoner) that Ponzi be made available, from day to day, for trial in the state courts upon an indictment there pending. Recognizing that the Attorney General had no express authority for making the federal prisoner available to Massachusetts (p. 261), this Court nonetheless concluded that such action was within the Attorney General's broad powers as chief law officer of the United States (pp. 262–264). Describing the situation as one requiring "a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure" (p. 259), the Court, in a unanimous opinion by Chief Justice Taft, held (p. 260):

> One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive

[28] The writ is a venerable one which issues "when it is necessary to remove a prisoner, in order to prosecute * * * in the proper jurisdiction wherein the fact was committed." 3 Blackstone, *Commentaries* 130.

custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. *In re Andrews*, 236 Fed. 300; *United States* v. *Marrin*, 227 Fed. 314. Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it.

A similar challenge to executive authority had been earlier made in *Roberts* v. *Reilly*, 116 U. S. 80. Roberts was under indictment in New York and the Governor of that State made due demand upon the Governor of Georgia that he be apprehended in Georgia and delivered to New York's authorities as a fugitive from justice. See U. S. Constitution, Art. IV, Sec. 2, clause 2. Following his arrest in Georgia, Roberts applied for a writ of *habeas corpus* in the District Court for the Southern District of Georgia, alleging that the acts with which he was charged by New York showed that he had committed a crime in the State of Georgia, as well as in the State of New York, and that the Governor of Georgia was bound to hold him to answer to the laws of Georgia before permitting him to be sent away for trial in another jurisdiction. If it be true, this Court observed, that the offense was initiated in Georgia and violated its laws, "it is none the less true that the offence charged is also a crime in New York against its laws; and the State of Georgia may choose to waive the exercise of

its jurisdiction by surrendering the fugitive to answer to the laws of New York" (pp. 96–97).[30]

There is similar executive discretion when a foreign government seeks extradition pursuant to treaty or agreement. John Bassett Moore has pointed out that "[i]t is, of course, within the discretion of the government upon which the demand is made to deliver up the prisoner, notwithstanding that a criminal prosecution is pending against him for a violation of its own laws" (1 Moore, *Extradition*, Sec. 369).[31] The inter-

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[30] Since custody is not "a place of sanctuary" (*Rigor* v. *State*, 101 Md. 465, 471–472, quoted with approval in *Ponzi*, 258 U. S. at 264), it has been frequently observed that waiver of custody is the sovereign's privilege and that its exercise is not subject to challenge by the individual. See the excerpt from *Ponzi* quoted in the text, *supra*. See, also, *Mitchell* v. *Boen*, 194 F. 2d 405, 407 (C. A. 10) ("The sovereign alone may raise objections to the interference with its rights to the possession of a prisoner, under the rule of comity."); *People* v. *Klinger*, 319 Ill. 275, 278, 149 N. E. 799, 801. ("The right of the Governor of the asylum state to decline to honor a demand for extradition is a right of the state, and is in nowise based on the personal right of the fugitive, and, where no objection is made by the court or authorities who have jurisdiction over the fugitive, he has no right to object to the exercise of jurisdiction over him by the court of another state".) Similarly, the immunity of a soldier within the United States from state prosecution is a matter to be asserted not by the individual but by the military authorities, who may waive the immunity without regard to the desires of the defendant. *Harris* v. *Hunter*, 170 F. 2d 552 (C. A. 10); *Kennedy* v. *Sanford*, 466 F. 2d 568 (C. A. 5), certiorari denied, 333 U. S. 864. See also, as to waiver of diplomatic immunity, *supra*, pp. 36–37.

[31] As we noted in our petition (p. 26 and p. 26, note 7), various extradition treaties to which the United States is party provide in terms that the executive of the asylum state shall determine, in its discretion, whether to surrender the accused. Such provisions, this Court observed in *Valentine* v. *United*

national practice is strikingly exemplified by the case of one Vernon Locke who was implicated in the notorious seizure of the vessel *Chesapeake* in 1863 and wanted by the United States to answer charges of murder and piracy. When demand for Locke was made upon the British Government, it appeared that he had already been committed for trial in the Bahamas on charges of forgery and conspiracy committed in that country. In reply to the American demand, Earl Russell advised (Dip. Cor., 1865, part 1, p. 385, quoted in Moore, *op. cit.*, Sec. 369):

> I have the honor to inform you of the decision which, after attentive consideration of all the circumstances of the case, her Majesty's gov-

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States ex rel. Neidecker, 299 U. S. 5, 12, are "familiar." For seventy years, the United States has had in effect with Japan an extradition treaty under which the turning over of citizens was discretionary on each side. Article VII, Treaty of April 29, 1886, TS 191, 24 Stat. 1015. Similar clauses appear in the treaty with Argentina of September 26, 1896, TS 6, 31 Stat. 1883, the treaty with Uruguay of March 11, 1905, TS 501, 35 Stat. 20028, and the former treaty with the Orange Free State of October 28, 1896, TS 266, 31 Stat. 1813. The following treaties specifically confer discretion upon the executive authority: treaty with Guatemala of February 27, 1903, TS 425, 33 Stat. 2147; treaty with Mexico of February 22, 1899, TS 242, 31 Stat. 1818; treaty with Nicaragua of March 1, 1905, TS 462, 35 Stat. 1869, in an article reading:

> Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so.

For the background of the Mexican treaty and an account of President McKinley's exercise of his discretion, in the case of Mattie Rich, see Rafuse, *The Extradition of Nationals* (1939), University of Illinois, pp. 44–46.

State Department files establish that this discretion has been regularly exercised, usually in favor of extradition.

ernment have come to in regard to this matter. It appears to her Majesty's government that the United States government are not entitled to obtain the extradition of Locke, until he shall have been tried for the offences alleged to have been committed by him against British law, and, if convicted, shall have undergone any sentence which may be passed upon him. But her Majesty's government are unwilling that, in consequence of any delay on this account in the extradition of Vernon Locke, the means of supporting the graver charge against him should be weakened, and I have, therefore, to state to you that her Majesty's government will waive their right to prosecute Locke for the offence of conspiracy and forgery, if the evidence upon the charge arising out of the seizure of the "Chesapeake" shall prove to be sufficient to justify extradition by the government of the Bahamas.[32]

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[32] The executive always makes the ultimate decision as to whether an individual shall be surrendered under a treaty of extradition. This is so even though the accused has been duly committed by a magistrate and the order of commitment has been sustained on *habeas corpus*. *In re Stupp*, 12 Blatch. 501, 516–517 (C. Ct., N. Y.); *Collier* v. *Vaccaro*, 51 F. 2d 17, 20 (C. A. 4); *In re Ezeta*, 62 Fed. 964, 996 (N. D. Cal.); 2 Hyde, *International Law* (2d rev. ed.) Sec. 340. As Judge Parker noted in the *Vaccaro* case, the executive may consider numerous factors which it is not for the courts to take into account in making the limited examination available on *habeas corpus* (51 F. 2d at 21). Note that the provisions governing extradition procedure require that the full record of the commitment hearing be certified to the Secretary of State. 62 Stat. 822, 18 U. S. C. 3184.

Valentine v. *United States ex rel. Neidecker*, 299 U. S. 5, is entirely consistent. In that case, this Court concluded that the extradition treaty between the United States and France did not cover citizens of the asylum state and that accordingly there was

An even stronger view as to executive authority over extradition was taken by John Marshall as a member of Congress in 1800.[33]

In the instant case, the respondent is on Japanese soil, where the alleged offense took place. The Japanese Government has asserted jurisdiction. The executive decision to respect that assertion and to waive any American claim to jurisdiction over respondent has been made in the exercise of a discretionary power which is explicitly written into the international agreement. Under established principles, there is not the slightest warrant for an assertion that respondent has a legal immunity under American law which insulates him from the necessity of answering the Japanese charge that he is criminally responsible for the death of a Japanese woman caused in Japan. See also Point IV, *infra*, pp. 71–78. The executive action taken is within executive prerogatives under the United

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no authority by which the United States could turn over to France an American citizen physically present in this country. If the treaty had covered citizens of the asylum state (as did the agreements between the United States and various other countries, 299 U. S. at 7), the ultimate decision whether to honor or decline the French demand would have rested with the Chief Executive. Hyde, *op. cit.*, Sec. 340.

[33] Marshall not only pointed out that the President could stop a national prosecution in order to make a person available for extradition, but stated (Annals of Congress, 6th Congress, col. 615):

> It is then demonstrated that, according to the principles of the American Government, the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question the power to decide which rests alone with the Executive department.

States Constitution and in strict accord with binding international agreements. When American soldiers enter a foreign country with the permission of the foreign sovereign, the situation is necessarily a delicate one—one calling peculiarly for that "reciprocal comity" to which this Court adverted in *Ponzi* v. *Fessenden*.[34] The agreement betwen the two countries recognizes and reflects this vital need. The President is, and must be, free to give it effect.

2. As we have just shown, it is not necessary that there exist specific Congressional legislation authorizing the remission of a defendant for prosecution by another jurisdiction; the international arrangement, taken together with the President's powers in the field of foreign affairs and as commander-in-chief, are sufficient. But the fact is that Congress has specifically authorized the trial of military personnel by local civil authorities. Article 74 of the old Articles of War made it mandatory on Army commanding officers to turn soldiers over to local civil authorities within the United States (41 Stat. 803):

> ART. 74. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial

[34] We emphasize again that, whatever immunity an individual may have (under international law or international agreement) from trial by the state with territorial jurisdiction, that immunity is for the benefit of his own state and may be waived by that state without his consent or over his objection. See *supra*, pp. 34–37, 61–63. This settled rule underscores the argument we have been making in the text, *i. e.*, that discretion may validly be lodged in the executive to decide whether an accused should be remitted for trial by the territorial jurisdiction.

or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense *committed within the geographical limits of the States of the Union and the District of Columbia,* and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. * * * [Emphasis added.]

In adopting the Uniform Code of Military Justice, the geographical limitation was eliminated, and it was made discretionary rather than mandatory to turn a soldier over to local civil authorities:

ART. 14. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES

(a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

* * * * *

[10 U. S. C. (Supp. IV) 814, 70A Stat. 41]

Reading Article 14 in conjunction with Article 5, which provides, "This chapter applies in all places," there can be no doubt that Congress, by legislation, has granted adequate authority to deliver soldiers for trial by civil authority at home or abroad.

B. The executive determination to forego the exercise of jurisdiction over respondent is not judicially reviewable

The decision whether, under Paragraph 3 (c) of the Protocol, the United States is to exercise its primary jurisdiction is obviously one for the Executive Branch in the conduct of military and foreign affairs. There are no judicial standards by which this decision can be tested. The problems of foreign relations provide both the context of, and the touchstone for, the exercise or nonexercise of the waiver provisions. It necessarily follows that a decision not to exercise—or to waive—jurisdiction is plainly not a matter for judicial review.

In the related field of extradition, this Court said in *Terlinden* v. *Ames*, 184 U. S. 270, 289, 290:

> The power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. *Holmes* v. *Jennison*, 14 Pet. 540, 569. Its exercise pertains to public policy and governmental administration, is devolved on the Executive authority, and the warrant to surrender is issued by the Secretary of State as the representative of the President in foreign affairs.
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> * * * * *
>
> The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision * * *.

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In general, the courts have, since the earliest days of the Republic, recognized the conduct of foreign relations as falling within the exclusive power of the political branches of the Government, particularly the Executive. *E. g., Foster* v. *Neilson,* 2 Pet. 253; *Williams* v. *Suffolk Insurance Co.,* 13 Pet. 415; *The Chinese Exclusion Case,* 130 U. S. 581; *Jones* v. *United States,* 137 U. S. 202; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304. See also *supra,* pp. 30–31. A classic enunciation of judicial abstinence in this field is set forth in *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.,* 333 U. S. 103, 111:

> * * * the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

It would be difficult to find a case to which this admonition is more applicable. Untold and immeasurable damage to the foreign relations of the United States will inevitably result if its hands are to be tied by the type of judicial intervention which

the respondent seeks. This Court, it is submitted, should reject that responsibility. It has always insisted that American courts "should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35; *Ex parte Peru*, 318 U. S. 578, 588; see *United States* v. *Lee*, 106 U. S. 196, 209.

C. There has been no abuse of discretion

Even assuming that the executive decision not to exercise primary jurisdiction over respondent—to "waive" jurisdiction—may be subject to judicial review on the merits, the scrutiny should be limited by the accepted standard which recognizes that in the international field the President must be accorded a degree of discretion and freedom from restriction "which would not be admissible were domestic affairs alone involved." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320.

In any event, it is clear that there was no abuse of discretion. There was a prolonged dispute between Japan and the United States as to which had primary jurisdiction. See the Statement, *supra*, pp. 3–9. Japan's contention that the killing did not arise from an act done in the performance of official duty was not unreasonable.[35] Its position was apparently supported by the United States Army Circular (Appendix A, *infra*, p. 37a) which provided that, for the purposes of the agreements with Japan, "official duty"—

[35] In this connection, see the facts with respect to the claims of each side set forth in the "Affidavit With Respect to Facts," dated June 8, 1957, by General Counsel Dechert of the Department of Defense.

> * * * is meant to apply only to acts which are *required* to be done as a function of those duties which the individuals are performing. [Emphasis added.]

There was the further question of whether a Japanese court did not have the right to make a judicial determination of the question of whether the act done was in the performance of official duty. The Agreed Official Minutes to the Protocol (Appendix A, *infra*, p. 29a) provided that the certificate of a commanding officer—

> * * * shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

This language may be said to refer to a determination of performance-of-duty status by a Japanese judicial proceeding.* This has never yet been done, and there may be advantages to the United States in not establishing such a practice.

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* See the reference to the Japanese Code (Appendix A, *infra*, p. 29a). The language itself is derived from the British Visiting Forces Act of 1952, which was amended in passage so that the certificate of a visiting commanding officer that an offense arose from an act done in the performance of official duty would not be conclusive on the British courts. See, *e. g.*, 178 Parliamentary Debates (Hansard) (Lords), 5th Series, page 1076:

> Now, the man is brought before a court in the United Kingdom, and that court can say "No, it is not conclusive: we will show that the certificate is wrong." That is the only result of the Amendment.

See also Hearing before a Senate Subcommittee on Armed Services, Operation of Article VII NATO Status of Forces Treaty, 85th Cong., 1st Sess., p. 17: "In England, however, by the statute * * * the determination of the commander is given only prima facie weight and the final determination rests with the court."

Further, Japan has waived its primary jurisdiction in over 97 percent of the cases involving members of the United States military forces where primary jurisdiction was in Japan. See *supra*, pp. 54–55. This is the first case in which the United States has made a decision not to exercise primary jurisdiction where, by present hypothesis, it had it. It may well be that the United States concluded that to waive jurisdiction in this case was essential if the United States was to continue to ask and receive waivers in the vast number of cases where Japan had primary jurisdiction. Moreover, the position of the United States *vis-à-vis* the other nations with comparable jurisdictional agreements had to be taken into account. As noted above (*supra*, p. 55), over a recent three-year period these countries waived their primary jurisdiction in over 73% of the cases.

The very recitation of these considerations, together with the sharply disputed facts as to the circumstances of the killing (see the Statement, *supra*, and App. B, *infra*, pp. 39a–40a, 42a–43a), demonstrate not only that the decision of the Executive was reasonable, but that the decision itself is one for the Executive to make, rather than a court.

IV

A FEDERAL OFFICER HAS NO PERSONAL CONSTITUTIONAL RIGHT TO TRIAL BY THE UNITED STATES RATHER THAN BY ANOTHER JURISDICTION, AND RESPONDENT HAS NO SUCH STATUTORY RIGHT

Invoking principles of American federalism rather than those of international law, the District Court as-

sumed that a federal officer charged with a state crime committed in the performance of official duty has a personal constitutional right to trial exclusively in the federal courts. The court therefore held that "Applying the same constitutional protection to the [respondent] against his delivery to a foreign State that would be applied to his delivery for prosecution in a state court, * * * the threatened action by the [petitioners] is illegal and in violation of the Constitution and laws of the United States" (Appendix B, *infra*, pp. 49a–50a).

We shall show, however, that there is in fact no such constitutional right to trial in the federal courts and that the cases upon which the court below principally relied have reference to a statutory remedy which in that instance vindicates no personal right of the accused but rather the supremacy of federal law under Article VI of the Constitution. And, of course, the concept of supremacy of federal law is entirely inapposite to this case, where the jurisdictional interests of two co-equal sovereigns are in question. In misapplying the principles governing remissions of a federal officer for state trial, the District Court totally disregards both the international character of the present case, and the existence and explicit terms of Paragraph 3 (c), the "waiver" provision. (Nor did the court below specify what assumed constitutional rights of the petitioner would be violated.) Japan is not like a state of the American union, subordinate to the Federal Government and its courts. Japan is an independent sovereign power with full jurisdiction under international law to try all offenses

against its laws committed on its territory; and in its international arrangement with this country it has preserved that jurisdiction.

A. The heart of the District Court's ruling lies in its reliance on *In re Neagle*, 135 U. S. 1. The court wrote (Appendix B, *infra*, p. 48a):

> Since the petitioner's act was committed in the performance of official duty, under the principles announced by the Supreme Court in the case of *In Re Neagle*, 135 U. S. 1, the petitioner is accountable only to United States Federal jurisdiction for any act or omission. * * *.

But *In re Neagle* does not support respondent at all.

The case was an appeal from an order discharging Neagle, a deputy United States marshal, from the custody of a California sheriff. Neagle, who had been assigned to guard Justice Field, in the performance of his official duties killed Field's assailant, David S. Terry. Charged with murder by the state of California, Neagle sought and was granted discharge on a writ of habeas corpus. The Court held that the discharge was proper under then Section 753 of the Revised Statutes,[37] which provided that "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is * * * in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; * * *." In holding that that *statute* author-

[37] See 28 U. S. C. 2241 (c).

ized the proceeding (135 U. S. at 70), the Court emphasized the necessity for the supremacy of federal law in our governmental system. But both the statute and the concept which it reflects—that of the supremacy of federal law within the United States—are, of course, wholly absent in this case. Here, we have an international, rather than a federal, context; and we have the explicit "waiver" provisions of Paragraph 3 (c).

Indeed, where the writ is granted in the federal-state cases, as in *Neagle*, the federal court often proceeds on the assumption that, because federal law is supreme, there would be no violation of state law if the act is performed pursuant to a federal duty. See Strayhorn, *The Immunity of Federal Officers from State Prosecutions*, 6 North Carolina Law Review 123, 127. For example, in *In re Fair*, 100 Fed. 149, relied upon by the court below (Appendix B, *infra*, p. 48a), the question presented was whether the state court had jurisdiction to try petitioner for the slaying of a deserter who was fleeing from military custody, where the petitioner was following orders received from his Army superior. In answering this question in the negative, the court wrote (p. 151):

> * * * an act done by an officer or agent of the United States in and about a matter solely within federal control, and in pursuance of an authority given by the laws of the United States, is not an offense against the laws of the state (Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55).

This reasoning is clearly inapplicable where the alleged crime takes place on the territory of an entirely independent sovereign. In such a case, the act, regardless of its characterization by American law, is violative of the laws of the foreign sovereign. See *supra*, p. 23 *et seq.*

Moreover, the power of the federal court to issue a writ of *habeas corpus* where release from state custody is sought by a federal officer cannot be said to be founded on any personal constitutional right of the accused not to be tried by the state, for issuance of such a writ is entirely discretionary with the court.[38] Thus, this Court said in *Drury* v. *Lewis*, 200 U. S. 1, 8, where release from state custody was denied a soldier held for a homicide which he claimed was committed in performance of a federal duty:

> We have repeatedly held that the acts of Congress in relation to *habeas corpus* do not imperatively require the Circuit Courts to wrest petitioners from the custody of state officers in advance of trial in the state courts, and that those courts may decline to discharge in the proper exercise of discretion * * *.

If there were any personal constitutional right of the accused to choose the forum in which he would be tried, grant of the writ would be mandatory and would not rest in the discretion of the court. But not only is the grant of the writ discretionary; in the absence

[38] Compare the rule that international immunities are for the benefit of the state, rather than the individual, and may be waived without the consent of the individual. *Supra*, pp. 34–37; and see *supra*, pp. 51 ff, on extradition and on remission of servicemen for trial by state courts.

of extraordinary circumstances, the petitioner is required to present his claim of a federal defense in the state courts. See Hart and Wechsler, *The Federal Courts and the Federal System*, 380.

Nor does *Johnson* v. *Maryland*, 254 U. S. 51, stand for the proposition that a federal officer has a personal right to a federal trial. There, Johnson was an employee of the United States Post Office and while driving a government motor truck in the transportation of mail was arrested in Maryland, tried in the courts of that state, and convicted for driving without a state license. The Court held that the conviction could not stand because the state could not constitutionally require a federal officer to desist from the performance of his duties until he had satisfied a state requirement in addition to those that the federal government had pronounced sufficient. This case plainly does not establish an immunity from state trial but merely the unconstitutionality of the particular state statute as applied to the federal officer. Not only was the trial in fact conducted in the state court but Justice Holmes observed: "It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets." 254 U. S. at 56. Thus, not only is there no personal constitutional immunity from trial in the state courts for acts arising out of the performance of federal duties but, indeed, under certain circum-

stances, there may even be ultimate liability to the state for these acts.

B. We believe it clear that in the federal-state cases the right to assert jurisdiction is one which rests in the first instance with the sovereign, and that in those instances the statutory remedy of *habeas corpus* protects no personal constitutional right. And it is likewise clear that no other statutory right is available to respondent. The statutory right to remove an action commenced in a state court to a federal court, conferred by 28 U. S. C. 1442a, does not aid him.[39] This statute, applicable only to removal of actions from a state court, does not confer any right beyond its specific terms to trial in a federal court. Again, the underlying principle embodied in the statute is that of the supremacy of federal law within the United States. Congress may provide for the removal of actions from state to federal courts because the states have ceded to the national government some of the attributes of sovereignty. *Tennessee* v. *Davis*, 100 U. S. 257. Japan has made no like cession of sovereignty.

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[39] 28 U. S. C. 1442a provides:

> A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is pending in the manner prescribed by law, and it shall thereupon be entered on the docket of the district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine the cause.

Furthermore, there is no Congressional legislation requiring that respondent be tried in an American forum, let alone a federal forum. On the contrary, as we have pointed out above (*supra*, p. 65–66), Article 14 of the Uniform Code of Military Justice specifically envisages that servicemen may be handed over to a "civil authority" for trial.

In summary, the authorities relied on by the court below to establish the proposition that respondent "is accountable only to United States Federal jurisdiction" deal with acts which took place within the territorial confines of the United States, were concerned solely with state-federal jurisdictional conflicts, and were resolved by reference to the principle of federal supremacy. They are all plainly inapplicable here.

CONCLUSION

We have shown that under international law, under the agreement with Japan, and under the United States Constitution, respondent has no personal immunity from prosecution by Japan for the killing of a Japanese national in Japanese territory. Whatever express or implied immunity there might be is for the benefit of the United States, may be waived by it, and has been waived. We have also demonstrated that the international arrangement with Japan under which the waiver took place is valid and binding on the United States, and that nothing in our Constitution or laws precludes the exercise of executive discretion to decline to exercise jurisdiction in respondent's case. This exercise of executive discretion is not reviewable by the courts, and

if it were it would have to be upheld in this case as reasonable.

But we should also point out, in closing, that even if the international arrangement were held to be invalid or inoperative Japan would have jurisdiction over respondent. In the absence of the agreement the United States could not assert exclusive jurisdiction. Valid or not, the agreement indicates that Japan retained concurrent jurisdiction over United States personnel and set the maximum limit on the immunity which it would grant, and for which it gave certain concessions. If the United States is not free to carry out its side of the bargain, Japan, it would seem, could properly assert the right as the territorial sovereign to try respondent.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed and the injunction vacated.

HERBERT BROWNELL, JR.,
Attorney General.

J. LEE RANKIN,
Solicitor General.

OSCAR H. DAVIS,
ROGER FISHER,
LEONARD B. SAND,
RALPH S. SPRITZER,
Assistants to the Solicitor General.

HOWARD E. SHAPIRO,
Attorney.

JULY 1, 1957.

APPENDIX A

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[Matter which might be considered particularly relevant has been printed in bold face type]

Treaties and Other International Acts Series 2490

TREATY OF PEACE WITH JAPAN

- Signed at San Francisco September 8, 1951
- Ratification advised by the Senate of the United States of America March 20, 1952, with a declaration
- Ratified by the President of the United States of America April 15, 1952, subject to declaration
- Ratification of the United States of America deposited at Washington April 28, 1952
- Proclaimed by the President of the United States of America April 28, 1952
- Entered into force April 28, 1952

TREATY OF PEACE WITH JAPAN

Whereas the Allied Powers and Japan are resolved that henceforth their relations shall be those of nations which, as sovereign equals, cooperate in friendly association to promote their common welfare and to maintain international peace and security, and are therefore desirous of concluding a Treaty of Peace which will settle questions still outstanding as a result of the existence of a state of war between them;

* * * * *

CHAPTER I

PEACE

ARTICLE 1

(a) The state of war between Japan and each of the Allied Powers is terminated as from the date on which the present Treaty comes into force between Japan and the Allied Power concerned as provided for in Article 23.

(b) The Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters.

CHAPTER II

TERRITORY

ARTICLE 2

(a) Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, includ-

ing the islands of Quelpart, Port Hamilton and Dagelet.

(b) Japan renounces all right, title and claim to Formosa and the Pescadores.

(c) Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.

(d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan.

(e) Japan renounces all claim to any right or title to or interest in connection with any of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise.

(f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.

ARTICLE 8

* * * * *

Treaties and Other International Acts Series 2491

SECURITY TREATY

Between the
UNITED STATES OF AMERICA
and JAPAN

- Signed at San Francisco September 8, 1951
- Ratification advised by the Senate of the United States of America March 20, 1952
- Ratified by the President of the United States of America April 15, 1952
- Ratified by Japan November 19, 1951
- Ratifications exchanged at Washington April 28, 1952
- Proclaimed by the President of the United States of America April 28, 1952
- Entered into force April 28, 1952

SECURITY TREATY

BETWEEN

THE UNITED STATES OF AMERICA AND JAPAN

Japan has this day signed a Treaty of Peace with the Allied Powers.[1] On the coming into force of that Treaty, Japan will not have the effective means to exercise its inherent right of self-defense because it has been disarmed.

There is danger to Japan in this situation because irresponsible militarism has not yet been driven from the world. Therefore Japan desires a Security Treaty with the United States of America to come into force simultaneously with the Treaty of Peace between the United States of America and Japan.

The Treaty of Peace recognizes that Japan as a sovereign nation has the right to enter into collective security arrangements, and further, the Charter of the United Nations recognizes that all nations possess an inherent right of individual and collective self-defense.

In exercise of these rights, Japan desires, as a provisional arrangement for its defense, that the United States of America should maintain armed forces of its own in and about Japan so as to deter armed attack upon Japan.

The United States of America, in the interest of peace and security, is presently willing to maintain

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[1] Treaties and Other International Acts Series 2490.

certain of its armed forces in and about Japan, in the expectation, however, that Japan will itself increasingly assume responsibility for its own defense against direct and indirect aggression, always avoiding any armament which could be an offensive threat or serve other than to promote peace and security in accordance with the purposes and principles of the United Nations Charter.

Accordingly, the two countries have agreed as follows:

ARTICLE I

Japan grants, and the United States of America accepts, the right, upon the coming into force of the Treaty of Peace and of this Treaty, to dispose United States land, air and sea forces in and about Japan. Such forces may be utilized to contribute to the maintenance of international peace and security in the Far East and to the security of Japan against armed attack from without, including assistance given at the express request of the Japanese Government to put down large-scale internal riots and disturbances in Japan, caused through instigation or intervention by an outside power or powers.

ARTICLE II

During the exercise of the right referred to in Article I, Japan will not grant, without the prior consent of the United States of America, any bases or any rights, powers or authority whatsoever, in or relating to bases or the right of garrison or of maneuver, or transit of ground, air or naval forces to any third power.

ARTICLE III

The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments.

ARTICLE IV

This Treaty shall expire whenever in the opinion of the Governments of the United States of America and Japan there shall have come into force such United Nations arrangements or such alternative individual or collective security dispositions as will satisfactorily provide for the maintenance by the United Nations or otherwise of international peace and security in the Japan Area.

ARTICLE V

This Treaty shall be ratified by the United States of America and Japan and will come into force when instruments of ratification thereof have been exchanged by them at Waskington.

IN WITNESS WHEREOF the undersigned Plenipotentiaries have signed this Treaty.

DONE in duplicate at the city of San Francisco, in the English and Japanese languages, this eighth day of September, 1951.

For the United States of America:

DEAN ACHESON
JOHN FOSTER DULLES
ALEXANDER WILEY
STYLES BRIDGES

For Japan:

SHIGERU YOSHIDA.

Treaties and Other International Acts Series 2492

ADMINISTRATIVE AGREEMENT

Between the
UNITED STATES OF AMERICA
and JAPAN

- Signed at Tokio February 28, 1952
- Entered into force April 28, 1952

ADMINISTRATIVE AGREEMENT

UNDER ARTICLE III OF THE SECURITY TREATY BETWEEN THE UNITED STATES OF AMERICA AND JAPAN

PREAMBLE

Whereas the United States of American and Japan on September 8, 1951, signed a Security Treaty which contains provisions for the disposition of United States land, air and sea forces in and about Japan;

And whereas Article III of that Treaty states that the conditions which shall govern the disposition of the armed forces of the United States in and about Japan shall be determined by administrative agreements between the two Governments;

And whereas the United States of America and Japan are desirous of concluding practical administrative arrangements which will give effect to their respective obligations under the Security Treaty and will strengthen the close bonds of mutual interest and regard between their two peoples;

Therefore, the Governments of the United States of America and of Japan have entered into this Agreement in terms as set forth below:

* * * * *

ARTICLE II

1. Japan agrees to grant to the United States the use of the facilities and areas necessary to carry out the purposes stated in Article I of the Security Treaty. Agreements as to specific facilities and areas,

not already reached by the two Governments by the effective date of this Agreement, shall be concluded by the two Governments through the Joint Committee provided for in Article XXVI of this Agreement. "Facilities and areas" include existing furnishings, equipment and fixtures necessary to the operation of such facilities and areas.

* * * * *

4. (a) When facilities and areas such as target ranges and maneuver grounds are temporarily not being used by the United States armed forces, interim use may be made by Japanese authorities and nationals provided that it is agreed that such use would not be harmful to the purposes for which the facilities and areas are normally used by the United States armed forces.

(b) With respect to such facilities and areas as target ranges and maneuver grounds which are to be used by United States armed forces for limited periods of time, the Joint Committee shall specify in the agreements concerning such facilities and areas the extent to which the provisions of this Agreement shall apply.

ARTICLE III

1. The United States shall have the rights, power and authority within the facilities and areas which are necessary or appropriate for their establishment, use, operation, defense or control. . . .

* * * * *

ARTICLE XIV

1. Persons, including corporations organized under the laws of the United States, and their employees who are ordinarily resident in the United States and whose presence in Japan is solely for the purpose of

executing contracts with the United States for the benefit of the United States armed forces shall, except as provided in this Article, be subject to the laws and regulations of Japan.

* * * * *

7. Japanese authorities shall have the primary right to exercise jurisdiction over the persons and their employees referred to in paragraph 1 of this Article in relation to offenses committed in Japan and punishable by the law of Japan. In those cases in which the Japanese authorities decide not to exercise such jurisdiction they shall notify the military authorities of the United States as soon as possible. Upon such notification the military authorities of the United States shall have the right to exercise such jurisdiction over the persons referred to as is conferred on them by the law of the United States.

* * * * *

ARTICLE XVI

It is the duty of members of the United States armed forces, the civilian component, and their dependents to respect the law of Japan and to abstain from any activity inconsistent with the spirit of this Agreement, and, in particular, from any political activity in Japan.

ARTICLE XVII

1. Upon the coming into force with respect to the United States of the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces," signed at London on June 19, 1951, the United States will immediately conclude with Japan, at the option of Japan, an agreement on criminal

jurisdiction similar to the corresponding provisions of that Agreement.

2. Pending the coming into force with respect to the United States of the North Atlantic Treaty Agreement referred to in paragraph 1, the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality. **Such jurisdiction may in any case be waived by the United States.**

3. While the jurisdiction provided in paragraph 2 is effective, the following provisions shall apply:

* * * * *

ARTICLE XXVI

1. A Joint Committee shall be established as the means for consultation between the United States and Japan on all matters requiring mutual consultation regarding the implementation of this Agreement. In particular, the Joint Committee shall serve as the means for consultation in determining the facilities and areas in Japan which are required for the use of the United States in carrying out the purposes stated in Article I of the Security Treaty.

2. The Joint Committee shall be composed of a representative of the United States and of Japan, each of whom shall have one or more deputies and a staff. The Joint Committee shall determine its own procedures, and arrange for such auxiliary organs and administrative services as may be required. The Joint Committee shall be so organized that it may meet immediately at any time at the request of the representative of either the United States or Japan.

3. If the Joint Committee is unable to resolve any matter, it shall refer that matter to the respective governments for further consideration through appropriate channels.

ARTICLE XXVII

1. This Agreement shall come into force on the date on which the Security Treaty between the United States and Japan enters into force.

* * * * *

IN WITNESS WHEREOF the representatives of the two Governments, duly authorized for the purpose, have signed this Agreement.

DONE at Tokyo, in duplicate, in the English and Japanese languages, both texts authentic, this twenty-eighth day of February, 1952.

For the Government of the United States of America:

[SEAL] DEAN RUSK
EARL D. JOHNSON

For the Government of Japan:

[SEAL] K. OKAZAKI

EXCHANGE OF NOTES

United States Note to Japan.

TOKYO, *February 28, 1952*

EXCELLENCY:

I have the honor to refer to our discussion on the terms of the Administrative Agreement signed today, in which Your Excellency stated as the opinion of the

Japanese Government that, as the occupation of Japan by the Allied Powers comes to an end on the coming into force of the Treaty of Peace with Japan, the use of facilities and areas by United States forces on the basis of occupation requisition also comes to an end on the same date; thereafter, the use of facilities and areas by United States forces must be based upon agreement between the two Governments, subject to the rights which each might have under the Treaty of Peace with Japan, the Security Treaty, and the Administrative Agreement. I hereby confirm that such is also the opinion of the United States Government.

* * * * *

Accept, Excellency, the assurances of my highest consideration.

DEAN RUSK
Special Representative of the President
of the United States of America

Treaties and Other International Acts Series 2848

AMENDMENT OF ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT UNDER ARTICLE III OF THE SECURITY TREATY

Protocol, and Official Minutes,
between the UNITED STATES OF AMERICA
and JAPAN

Signed at Tokyo September 29, 1953

Entered into force October 29, 1953

PROTOCOL TO AMEND ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT UNDER ARTICLE III OF THE SECURITY TREATY BETWEEN THE UNITED STATES OF AMERICA AND JAPAN

Whereas the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces", signed at London on June 19, 1951, [1] came into force on August 23, 1953 with respect to the United States of America; and

Whereas Japan desires to conclude with the United States of America an agreement on criminal jurisdiction similar to the corresponding provisions of the said Agreement in accordance with the provisions of paragraph 1 of Article XVII of the Administrative Agreement, signed at Tokyo on February 28, 1952, [2] under Article III of the Security Treaty [3] between the United States of America and Japan;

Now, the Governments of the United States of America and Japan have agreed that the existing provisions of Article XVII of the said Administrative Agreement shall be abrogated and the following provisions shall be substituted:

Article XVII

1. Subject to the provisions of this Article,

(a) the military authorities of the United States shall have the right to exercise within

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[1] Treaties and Other International Acts Series 2846.

[2] TIAS 2492.

[3] TIAS 2491.

Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States;

(b) the authorities of Japan shall have jurisdiction over the members of the United States armed forces, the civilian component, and their dependents with respect to offenses committed within the territory of Japan and punishable by the law of Japan.

2. (a) The military authorities of the United States shall have the right to exercise exclusive jurisdiction over persons subject to the military law of the United States with respect to offenses, including offenses relating to its security, punishable by the law of the United States, but not by the law of Japan.

(b) The authorities of Japan shall have the right to exercise exclusive jurisdiction over members of the United States armed forces, the civilian component, and their dependents with respect to offenses, including offenses relating to the security of Japan, punishable by its law but not by the law of the United States.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States

armed forces or the civilian component in relation to

(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent;

(ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the United States to exercise jurisdiction over persons who are nationals of or ordinarily resident in Japan, unless they are members of the United States armed forces.

5. (a) The military authorities of the United States and the authorities of Japan shall assist each other in the arrest of members of the United States armed forces, the civilian component, or their dependents in the territory of Japan and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

(b) The authorities of Japan shall notify promptly the military authorities of the United States of the arrest of any member of the United States armed forces, the civilian component, or a dependent.

(c) The custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged by Japan.

6. (a) The military authorities of the United States and the authorities of Japan shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

(b) The military authorities of the United States and the authorities of Japan shall notify each other of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.

7. (a) A death sentence shall not be carried out in Japan by the military authorities of the United States if the legislation of Japan does not provide for such punishment in a similar case.

(b) The authorities of Japan shall give sympathetic consideration to a request from the military authorities of the United States for assistance in carrying out a sentence of imprisonment pronounced by the military authorities of the United States under the provisions of this Article within the territory of Japan.

8. Where an accused has been tried in accordance with the provisions of this Article either by the military authorities of the United States or the authori-

ties of Japan and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the territory of Japan by the authorities of the other State. However, nothing in this paragraph shall prevent the military authorities of the United States from trying a member of its armed forces for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of Japan.

9. Whenever a member of the United States armed forces, the civilian component or a dependent is prosecuted under the jurisdiction of Japan he shall be entitled:

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;

(d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of Japan;

(e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan;

(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the United States and to have such a representative present at his trial.

10. (a) Regularly constituted military units or formations of the United States armed forces shall have the right to police any facilities or areas which

they use under Article II of this Agreement. The military police of such forces may take all appropriate measures to ensure the maintenance of order and security within such facilities and areas.

(b) Outside these facilities and areas, such military police shall be employed only subject to arrangements with the authorities of Japan and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the United States armed forces.

11. In the event of hostilities to which the provisions of Article XXIV of this Agreement apply, either the United States or Japan shall have the right, by giving sixty days' notice to the other, to suspend the application of any of the provisions of this Article. If this right is exercised, the United States and Japan shall immediately consult with a view to agreeing on suitable provisions to replace the provisions suspended.

The present Protocol shall come into effect thirty day after the date of its signing.

IN WITNESS WHEREOF the representatives of the two Governments, duly authorized for the purpose, have signed the present Protocol.

DONE at Tokyo, in duplicate, in the English and Japanese languages, both texts being equally authentic, this twenty-ninth day of September, 1953.

For the Government of the United States of America:

[SEAL] JOHN M. ALLISON

For the Government of Japan:

[SEAL] KATSUO OKAZAKI
TAKESHI INUKAI

AGREED OFFICIAL MINUTES REGARDING PROTOCOL TO AMEND ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND JAPAN

Re paragraph 1 (a) and paragraph 2 (a):

The scope of persons subject to the military law of the United States shall be communicated, through the Joint Committee, to the Government of Japan by the Government of the United States.

Re paragraph 2 (c):

Both Governments shall inform each other of the details of all the security offenses mentioned in this subparagraph and the provisions governing such offenses in the existing laws of their respective countries.

Re paragraph 3 (a) (ii):

Where a member of the United States armed forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that the alleged offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

The above statement shall not be interpreted to prejudice in any way Article 318 of the Japanese Code of Criminal Procedure.

Re paragraph 3 (c):

1. Mutual procedures relating to waivers of the primary right to exercise jurisdiction shall be determined by the Joint Committee.

2. Trials of cases in which the Japanese authorities have waived the primary right to exercise jurisdiction, and trials of cases involving offenses described in paragraph 3 (a) (ii) committed against the State or nationals of Japan shall be held promptly in Japan within a reasonable distance from the places where the offenses are alleged to have taken place unless other arrangements are mutually agreed upon. Representatives of the Japanese authorities may be present at such trials.

Re paragraph 4:

Dual nationals, United States and Japanese, who are subject to the military law of the United States and are brought to Japan by the United States shall not be considered as nationals of Japan, but shall be considered as United States nationals for the purposes of this paragraph.

Re paragraph 5:

1. In case the Japanese authorities have arrested an offender who is a member of the United States armed forces, the civilian component, or a dependent subject to the military law of the United States with respect to a case over which Japan has the primary right to exercise jurisdiction, the Japanese authorities will, unless they deem that there is adequate cause and necessity to retain such offender, release him to the custody of the United States military authorities provided that he shall, on request, be made available to the Japanese authorities, if such be the condition of his release. The United States authorities shall, on request, transfer his custody to the Japanese authorities at the time he is indicted by the latter.

2. The United States military authorities shall promptly notify the Japanese authorities of the arrest of any member of the United States armed forces, the civilian component or a dependent in any case in which Japan has the primary right to exercise jurisdiction.

Re paragraph 9:

1. The rights enumerated in items (a) through (e) of this paragraph are guaranteed to all persons on trial in Japanese courts by the provisions of the Japanese Constitution. In addition to these rights, a member of the United States armed forces, the civilian component or a dependent who is prosecuted under the jurisdiction of Japan shall have such other rights as are guaranteed under the laws of Japan to all persons on trial in Japanese courts. Such additional rights include the following which are guaranteed under the Japanese Constitution:

(a) He shall not be arrested or detained without being at once informed of the charge against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel;

(b) He shall enjoy the right to a public trial by an impartial tribunal;

(c) He shall not be compelled to testify against himself;

(d) He shall be permitted full opportunity to examine all witnesses;

(e) No cruel punishments shall be imposed upon him.

2. The United States authorities shall have the right upon request to have access at any time to members of the United States armed forces, the civilian component, or their dependents who are confined or detained under Japanese authority.

3. Nothing in the provisions of paragraph 9 (g) concerning the presence of a representative of the United States Government at the trial of a member of the United States armed forces, the civilian component or a dependent prosecuted under the jurisdiction of Japan, shall be so construed as to prejudice the provisions of the Japanese Constitution with respect to public trials.

Re paragraphs 10 (a) and 10 (b):

1. The United States military authorities will normally make all arrests within facilities and areas in use by and guarded under the authority of the United States armed forces. This shall not preclude the Japanese authorities from making arrests within facilities and areas in cases where the competent authorities of the United States armed forces have given consent, or in cases of pursuit of a flagrant offender who has committed a serious crime.

Where persons whose arrest is desired by the Japanese authorities and who are not subject to the jurisdiction of the United States armed forces are within facilities and areas in use by the United States armed forces, the United States military authorities will undertake, upon request, to arrest such persons. All persons arrested by the United States military authorities, who are not subject to the jurisdiction of the United States armed forces, shall immediately be turned over to the Japanese authorities.

The United States military authorities may, under due process of law, arrest in the vicinity of a facility or area any person in the commission or attempted commission of an offense against the security of that facility or area. Any such person not subject to the jurisdiction of the United States armed forces shall immediately be turned over to the Japanese authorities.

2. The Japanese authorities will normally not exercise the right of search, seizure, or inspection with respect to any persons or property within facilities and areas in use by and guarded under the authority of the United States armed forces or with respect to property of the United States armed forces wherever situated, except in cases where the competent authorities of the United States armed forces consent to such search, seizure, or inspection by the Japanese authorities of such persons or property.

Where search, seizure, or inspection with respect to persons or property within facilities and areas in use by the United States armed forces or with respect to property of the United States armed forces in Japan is desired by the Japanese authorities, the United States military authorities will undertake, upon request, to make such search, seizure, or inspection. In the event of a judgment concerning such property, except property owned or utilized by the United States Government or its instrumentalities, the United States will turn over such property to the Japanese authorities for disposition in accordance with the judgment.

Re application of the Protocol:

The provisions of the Protocol shall not apply to any offenses committed before the coming into

effect of the Protocol. Such cases shall be governed by the provisions of Article XVII of the Administrative Agreement as it existed prior to the coming into effect of the Protocol.

JOHN M. ALLISON
Ambassador Extraordinary and Plenipotentiary of the United States of America.

KATSUO OKAZAKI
Minister for Foreign Affairs of Japan.

TAKESHI INUKAI
Minister of Justice of Japan.

TOKYO, *September 29, 1953.*

AGREED VIEWS

SUB-COMMITTEE ON JURISDICTION

ADMINISTRATIVE AGREEMENT MATTERS

CRIMINAL PANEL

The matters of procedure, definition and interpretation set out below have been agreed to by the United States and Japanese members of the Criminal Panel, Jurisdiction Sub-committee, with respect to the Protocol and Official Minutes of 29 September 1953, amending Article XVII of the Administrative Agreement between the United States and Japan. These matters were approved by the Joint Committee under Article XXVI of the Administrative Agreement as follows:

* * * * *

Agreed Views No. 37 through No 43 . . . Approved 29 October 1953, effective 28 October 1953

* * * * *

PART II

EXERCISE OF JURISDICTION

* * * * *

No 39: The term "official duty" as referred to in paragraph 3 (a) (ii) of the Protocol and Official Minutes relating thereto is understood to be any duty or service required or authorized to be done by stat-

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ute, regulation, the order of a superior or military usage.

* * * * *

[Criminal Jurisdiction in Japan, Headquarters, Far East Command, APO 500, FEC Pamphlet No. 27–1, January 1956, pp. 7, 14]

UNITED STATES ARMY FORCES, FAR EAST
AND
EIGHTH UNITED STATES ARMY (REAR)
CIRCULAR 22–1

ADMINISTRATION OF MILITARY JUSTICE AND RELATED MATTERS

24 January 1956

* * * * * *

23. ACTS OR OMISSIONS ARISING FROM OFFICIAL DUTY.—*a.* General.—The United States has the primary right to exercise jurisdiction over offenses arising from an act or omission of a member or civilian employee of the United States armed forces arising from the performance of official duty. (See para 3, Article XVII.) The term "official duty" as used in Article XVII, Official Minutes, and the Agreed Views is not meant to include all acts by members of the armed forces and civilian component during periods while they are on duty, but is meant to apply only to acts which are required to be done as a function of those duties which the individuals are performing. Thus, a substantial departure from the acts a person is required to perform in a particular duty usually will indicate an act outside of his "official duty." [page 21]

* * * * * *

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APPENDIX B

In the United States District Court for the District of Columbia

H. C. 47–57

WILLIAM S. GIRARD, UNITED STATES ARMY SPECIALIST 3/C, PETITIONER

vs.

CHARLES E. WILSON, SECRETARY OF DEFENSE; JOHN FOSTER DULLES, SECRETARY OF STATE; WILBUR M. BRUCKER, SECRETARY OF THE ARMY; GENERAL MAXWELL D. TAYLOR, HEAD JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE; MAJOR GENERAL W. H. MAGLIN, PROVOST MARSHAL GENERAL, UNITED STATES ARMY; GENERAL LYMAN LEMNITZER, COMMANDING GENERAL, FAR EAST COMMAND; RESPONDENTS.

OPINION

This is a Petition for a Writ of Habeas Corpus and for other relief, filed by William S. Girard, United States Army Specialist Third Class, against the Secretary of Defense and others, in which he alleges that on or about January 30, 1957, he was arrested and thereafter held in confinement by the military authorities of the United States and is presently held in such confinement for the purpose of being delivered to the Government of Japan for trial for an alleged offense over which that Government has no jurisdiction, nor does it have jurisdiction over

the person of the petitioner. He further alleges that his detention is illegal and in violation of the Constitution and laws of the United States, as well as the treaty rights and obligations of the Government of the United States, and that the reasons for his detention and proposed delivery to the Japanese Government are invalid in law and in violation of fundamental constitutional and legal rights of petitioner.

The petitioner is a Specialist Third Class in the Regular Army of the United States, assigned to Company F, 8th Cavalry Regiment, at Camp Whittington, Honshu, Japan, having reenlisted while in Japan on October 28, 1954, for a period of three years.

On January 30, 1957, an incident occurred while the petitioner was on a firing range known as Camp Weir Range in Japan, resulting in the death of a Japanese woman for which the American military authorities propose to deliver petitioner to the Japanese Government for trial.

The incident is succinctly described in the certificate of the petitioner's commanding officer dated February 7, 1957, from which the following is quoted:

> "* * * I certify that GIRARD, William S. RA16452809, Specialist Third Class, Company F, 8th Cavalry Regiment, APO 201, was in the performance of his official duty at 1350 hours, 30 January 1957, Camp Weir Range Area, when he was involved in the following incident: On 30 January 1957, 2nd Battalion, 8th Cavalry Regiment, was engaged in routine training at Camp Weir Range Area. Company F was conducting blank firing exercises. Specialist Third Class William S. GIRARD was instructed by his platoon leader to move near a position near an unguarded machine gun to guard the machine gun and items of field equipment that

were in the immediate area. GIRARD, following instructions, moved to the designated position near the machine gun. While performing his duties as guard, he fired an expended cartridge case, as a warning, which struck and killed SAKAI, Naka, Kami-Shinden, Somamura, Gumma Prefecture, who had entered the range area for the purpose of gathering expended cartridge cases."

This certificate has never been withdrawn or modified in any respect.

The Security Treaty between the United States of America and Japan which entered into force on April 28, 1952, provided by Article III thereof that:

> "The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments."

Article XVII of the Administrative Agreement subsequently entered into between the Governments of the United States of America and Japan, defines the offenses of which the countries have concurrent jurisdiction and exclusive jurisdiction, respectively.

Paragraph 3 of Article XVII provides that with respect to cases where the right to exercise jurisdiction is concurrent, the military authorities of the United States shall have the *primary right* to exercise jurisdiction over the members of the United States armed forces or the civilian component *in relation to offenses arising out of any act or omission done in the performance of official duty.* (Italics supplied.)

The Agreed Official Minutes regarding this provision in Paragraph 3 provide that where a member of the United States armed forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that

the alleged offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

It was pursuant to these Official Minutes that the certificate of the petitioner's commanding officer was issued dated Februry 7, 1957.

The certificate by the commanding officer which was directed to the Chief Procurator, Maebashi District, Maebashi City, Honshu, Japan, continued by stating: "The United States will exercise jurisdiction in this case unless notification is given immediately that proof to the contrary exists."

Thereafter, on February 9, 1957, the Chief Procurator notified the petitioner's commanding officer with reference to his certificate as to official duty that "This office considers the proof contrary thereto exists, basing upon our examinations."

Following this exchange, there were discussions commencing in early March, 1957, by the representatives of the United States and representatives of Japan constituting a Joint U. S.—Japan Committee. On May 16, 1957, the United States representative on the Committee agreed that the United States would not exercise its asserted right of primary jurisdiction in this case. This action is said to have been taken in accordance with Paragraph 3 (c) of Article XVII of the Administrative Agreement, which reads as follows:

> "If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in

cases where that other State considers such waiver to be of particular importance."

Thereafter, on June 4, 1957, the Secretary of State of the United States and the Secretary of Defense of the United States who are named as two of the defendants in this action, issued a joint statement that they had carefully reviewed all of the available facts in this case, and have now concluded that the agreement that the petitioner be tried in the courts of Japan was reached in full accord with procedures established by the Treaty and Agreement, and that in order to preserve the integrity of the pledges of the United States, this determination by the Joint Committee must be carried out.

This joint statement related the circumstances substantially the same as, but in more detail than, those contained in the certificate by the petitioner's commanding officer. The following is quoted from the joint statement:

"* * * * *

"The incident occurred in a maneuver area provided by the Japanese Government for part-time use of United States forces. The Japanese Defense Force uses the same area about 40% of the time. When the area is not in use by either the United States or Japanese armed forces, Japanese civilians are permitted to farm or otherwise use the area.

"Efforts to keep civilians away from the area during such military exercises have not proved effective. In this particular case, red boundary flags were, as customary, erected as a warning to civilians to keep off, and local authorities were notified of the proposed exercises. But, as was frequently the case, a number of Japanese civilians were in the area gathering empty brass cartridge cases at the time of the incident. These civilians had created such a risk of injury

to themselves in the morning exercises when live ammunition was used that the American officer in charge withdrew live ammunition from the troops prior to the afternoon exercises. In the interval between two simulated attacks during the afternoon, Girard and another soldier, Specialist 3rd Class Victor M. Nickel, were ordered by their platoon leader, a Lieutenant, to guard a machine gun and several field jackets at the top of a hill. Girard and Nickel were not issued live ammunition for this duty.

"It was while these soldiers were performing this duty that the incident occurred. Mrs. Naka Sakai, a Japanese civilian, died a few moments after being hit in the back by an empty brass rifle shell case fired by Girard from his rifle grenade launcher. She was not over 30 yards from Girard and was going away from him when he fired the rifle. Girard had previously fired similarly in the vicinity of a Japanese man, who was not hit.

"Girard's action in firing empty shell cases from the rifle grenade launcher was not authorized. He asserted that he fired from the waist, intending only to frighten the Japanese civilians. Others stated, but Girard denied, that empty shell cases were thrown out to entice the Japanese to approach.

"* * * * *"

The joint statement relates that "The Commanding General of Girard's Division certified that Girard's action was done in performance of official duty".

The joint statement further relates that during the course of the meetings between the United States and Japanese representatives, while consideration was given to referring the matter in dispute to the two Governments for settlement, this procedure was rejected as inadvisable under the circumstances, and instructions were issued that the United States representative on the Joint Committee should continue to

press the claim for jurisdiction, but that, in case of continued deadlock, the United States representative was authorized to waive jurisdiction to Japan. After three weeks of additional negotiations "The U. S. representative waived jurisdiction in the name of the United States."

Thereafter, Girard was indicted by the Japanese judicial authorities for causing a death by wounding and at the present time he is administratively restricted to the limits of Camp Whittington.

The joint statement of the Secretaries was released on June 4, 1957 and the petition for Writ of Habeas Corpus was filed in this Court on June 6, 1957; an Order to Show Cause was issued the same day returnable on June 11, 1957, to which the respondents made return with accompanying exhibits, and the cause submitted for decision after full argument.

The decision of this case does not determine the guilt or innocence of the petitioner. The issue here is what tribunal should determine that question, and does the petitioner have a constitutional right which would be violated if he should be delivered to the Japanese Government for trial.

Nor is the question whether or not the petitioner would receive a fair trial if delivered to the Japanese Government for trial.

An affidavit of the General Counsel, Department of Defense, details the experience of the three United States Armed Services in Japan since the effective date of the Administrative Agreement in Japan and states that in a few instances suggestions of possible infringement of the rights of the accused have been made by an observer; that subsequent investigation by the Field Commander of the accused's has, in each instance, refuted or dispelled the suggestion and to date there has been no instance of the exercise by

Japan of criminal jurisdiction over United States personnel in which the conduct of the proceedings has disclosed a basis for diplomatic intervention.

On the basis of this experience, it is assumed that the petitioner would receive a fair trial if the defendants should deliver the petitioner to the Japanese Government for trial under the Japanese Constitution and laws.

The question which this Court must decide is whether the petitioner has a right under the Constitution of the United States to be tried for the alleged offense in an appropriate American tribunal and would that constitutional right be violated if he is delivered to the Japanese Government for trial.

It is uncontroverted that the petitioner at the time of the alleged occurrence was acting as a member of the American armed forces in the performance of his official duties as guard.

The certificate of the petitioner's commanding officer relates that petitioner "was instructed by his platoon leader to move near a position near an unguarded machine gun to guard the machine gun and items of field equipment that were in the immediate area"; that petitioner "*following instructions*, moved to the designated position near the machine gun" and "*while performing his duties as guard*" he fired the expended cartridge case. (Italics supplied.)

The joint statement issued by the Secretary of State and the Secretary of Defense, after relating the guard duty assigned to the petitioner and another soldier, states "*It was while these soldiers were performing this duty that the incident occurred.*" The joint statement further says that "the Commanding General of Girard's division certified that Girard's action was done in performance of official duty". (Italics supplied.)

the American Armed Forces in the performance of official duty, the Uniform Code of Military Justice establishes every procedure to be followed.

Since the petitioner's act was committed in the performance of official duty, under the principles announced by the Supreme Court in the case of *In Re Neagle*, 135 U. S. 1, the petitioner is accountable only to United States Federal jurisdiction for any act or omission. Additional authorities in support of this proposition are *Johnson* vs. *State of Maryland*, 254 U. S. 51; *Brown* vs. *Cain*, 56 F. Supp. 56; *Lima* vs. *Lawler*, 63 F. Supp. 446; *Colorado* vs. *Maxwell*, 125 F. Supp. 18; *In Re Fair, et al.*, 100 Fed. 149; *In Re Wulzen*, 235 Fed. 362.

In some of these cases, the factual situation was in dispute and required lengthy hearings to determine if the petitioner was acting in performance of official duty. Not so in the instant case, since the status of the petitioner is conceded.

The defendants placed reliance upon the decisions of this Court in the cases of *May* vs. *Wilson*, C. A. No. 128–56; D. C., D. C.; and *Cozart* vs. *Wilson*, 98 U. S. App. D. C. 437, 236 F. 2d, 732. Both of these cases arose out of offenses committed when the petitioners were off duty and, therefore, factually are distinguishable from the case now under consideration. *May* was not appealed, and in *Cozart* the Supreme Court granted a Petition for Writ of Certiorari and vacated the judgment of the Court of Appeals, remanding the case to the District Court with directions to dismiss the petition for Writ of Habeas Corpus upon the ground that the cause is moot. 352 U. S. 884. In pursuing this procedure, the Supreme Court cited *United States* vs. *Munsingwear, Inc.* 340 U. S. 36, which states "that procedure clears the path for future relitigation of the issues between the parties and

eliminates a judgment, review of which was prevented through happenstance."

Counsel for the defendants also cite cases in support of the proposition that "the jurisdiction of a Court-Martial is not exclusive and does not preempt the jurisdiction of state courts to deal with acts which violate state law as well as military law."

In none of the cases cited in support of this proposition were the accused charged with an offense performed in line of duty.

In *Caldwell* vs. *Parker*, 252 U. S. 376, the petitioner was charged with murder of a civilian at a place within the jurisdiction of the State of Alabama and not within the confines of any camp or place subject to the control of the civil or military authorities of the United States. *Kennedy* vs. *Sanford*, 166 F. 2d 568, related to a charge of conspiracy; *United States* vs. *Matthews*, 49 F. Supp. 203, was a charge of rape; and *United States* vs. *Canella*, 63 F. Supp. 377, related to a charge of bribery. Clearly these cases are distinguishable from the facts in the instant case.

Counsel for defendants further cite a series of cases in support of the proposition that "if there is any question as to whether a particular act was strictly within the scope of the authority of the soldier or whether such act constituted the only means available to perform the assigned duty, then the state court rather than a court-martial must be allowed to proceed with the case." These decisions are not in point in view of the stipulation that there is no issue of material fact with respect to the status of the petitioner at the time of the incident.

Applying the same constitutional protection to the petitioner against his delivery to a foreign State that would be applied to his delivery for prosecution in a state court, it follows that the threatened action by

the defendants is illegal and in violation of the Constitution and laws of the United States.

The petition is for a Writ of Habeas Corpus which appears to be authorized by *Cozart* vs. *Wilson, supra,* and *Eisentrager, et al.* vs. *Forrestal,* 84 U. S. App. D. C. 396, 174 F. 2d 961, since the petitioner is administratively restricted to the limits of Camp Whittington and, therefore, he is sufficiently restrained for the purposes of habeas corpus. However, since the petitioner remains a member of the United States Armed Forces in Japan and may be prosecuted in Court-Martial proceedings for the offense with which he is charged, the petition for the Writ will be denied and the Court will treat the complaint as a Petition for Declaratory Judgment and Injunction under the prayer of the complaint for other relief and, as such, will decree that the proposed delivery of the petitioner to the Japanese Government would violate rights of the petitioner guaranteed by the Constitution of the United States and will be enjoined.

This opinion may be treated as the Court's Findings of Fact and Conclusions of Law, and counsel for petitioner will submit an appropriate order in conformity herewith.

Joseph C. McGarraghy,
(sgd) JOSEPH C. MCGARRAGHY,
Judge.

JUNE 18, 1957.

In the United States District Court for the District of Columbia

H. C. 47–57

WILLIAM S. GIRARD, PETITIONER

v.

CHARLES E. WILSON, ET AL., RESPONDENTS.

ORDER

This matter having come on for hearing upon the petition for writ of habeas corpus and the Court having considered the petition, the Return and Answer to Rule to Show Cause and all the exhibits filed herein, and after a full and fair hearing having been accorded the parties thereto, it is by the Court this 18th day of June, 1957,

ORDERED, that in accordance with the Opinion filed this date, the petition for writ of habeas corpus is denied, the rule to show cause is discharged, and that respondents and those over whom they exercise command function be, and they hereby are, enjoined from delivering petitioner to the Japanese Government.

(s) JOSEPH C. MCGARRAGHY, *Judge.*

APPENDIX C

THE GENERAL POWER OF THE PRESIDENT TO ENTER INTO EXECUTIVE AGREEMENTS[1]

In considering the validity of an executive agreement, the basic axiom is that, as a sovereign state, the United States possesses, in its dealing with other states, all of the normal powers of a fully independent nation, subject to constitutional limitations like the Bill of Rights which govern all exercise of governmental authority in this country. These foreign affairs powers have been mainly entrusted to the President who is the country's organ in its relations with other nations. The Treaty Clause of the Constitution (Article II, Section 2) provides for Senate participation where a treaty is involved, but the United States can consummate agreements which are not treaties in the constitutional sense and do not require Senate action, and the President has authority to make such arrangements, acting alone, in appropriate fields and within appropriate limits.

1. *The plenary foreign relations power of the United States.*—It is often said that under our Constitution the "federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted" (see, *e. g.*, *United States* v. *Butler*, 297 U. S. 1, 63). But, as the Court has

[1] Almost all of this material was included in the Brief for the United States in *United States* v. *Guy W. Capps, Inc.*, Oct. Term, 1954, No. 14.

pointed out repeatedly, care must be taken to limit this characterization of our national government to its proper province, *i. e.*, the field of internal affairs (*Carter* v. *Carter Coal Co.*, 298 U. S. 238, 295; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 315–318; and *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, concurring opinions of Justices Frankfurter and Jackson at 610, and 635–636, fn. 2). For it is the basis of our constitutional plan that we are several as to all domestic matters—except so far as authority has been expressly delegated to the Federal Government—and one as to all foreign affairs.[2]

Accordingly, this Court indicated from the very outset that the Federal Government had all the rights of external sovereignty—not merely those expressly delegated to it in the Constitution. Cf. *Penhallow* v. *Doane*, 3 Dall. 54, 80–81, 92–96; *Ware* v. *Hylton*, 3 Dall. 199, 232. Despite some dispute as to the source of the full rights of external sovereignty held by the national government,[3] there is agreement that under

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[2] Cf. Thomas Jefferson's letters of August 14, 1787, to George Washington and Joseph Jones quoted in Warren, *The Making of the Constitution* (1937 ed.) 451; and see the concurring opinion of Mr. Justice Frankfurter in *United States* v. *Pink*, 315 U. S. 203, 242: "In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states."

[3] Some have believed that external sovereignty passed directly from the British crown to the Continental Congress and from it, through the Confederation, to the present United States, and was never possessed by the several States. See Mr. Justice Chase in *Ware* v. *Hylton*, 3 Dall. 199, 232. The famous holdings of Mr. Justice Paterson in *Penhallow* v. *Doane*, 3 Dall. 54, 80–81, and of Chief Justice Jay in *Chisholm* v. *Georgia*, 2 Dall. 419, 470–471, place the same interpretation on the historic

our constitutional plan full sovereignty in external affairs is vested in the Federal Government and that the country possesses all the normal powers of a sovereign nation. See Corwin, *The President, Office and Powers* (1948 ed.) pp. 209–213. The Court has consistently held that this country is "invested with power over all the foreign relations of the country" (*Knox* v. *Lee*, 12 Wall. 457, 555, Bradley, J., concurring) or "with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective." *Fong Yue Ting* v. *United States*, 149 U. S. 698, 711; see also *Burnet* v. *Brooks*, 288 U. S. 378, 396; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; and *Mackenzie* v. *Hare*, 239 U. S. 299, 311.[4] The contents and

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events leading to the formation of the Union. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 316–317. To the same effect, see Story, *Commentaries on the Constitution* (5th ed.), Secs. 198–217, especially Sec. 216; Miller, *Lectures on the Constitution, Davis' Notes*, 35–37; Butler, *The Treaty Making Power of the United States*, Vol. I, Secs. 22–36; 143–162; George Sutherland, *Constitutional Power and World Affairs*, 37–38, 44–45, 116–118.

On the other hand, Mr. Justice Iredell felt, in *Penhallow* v. *Doane*, 3 Dall. 54, 92–96, that external sovereignty was originally held by the States, which irrevocably transferred all of its incidents to the nation. To the same effect see *e. g.*, Attorney General Cushing, 8 Op. Atty. Gen. 411, 415, and James Brown Scott, *Proceedings of the American Society of International Law*, Vol. 28, p. 2, at 8–10; Levitan, *The Foreign Relations Power*, 55 Yale L. J. 467.

[4] As stated by the late Mr. Justice (then Senator) Sutherland: "The sovereign will of the Nation is embodied in the Constitution and its exercise by the government is measured thereby; but in the one case [internal affairs] it is manifested by what that instrument affirms and in the other case [external affairs] by what it fails to negative." George Sutherland, *Constitutional Powers and World Affairs* (1919), 47. See also

scope of the nation's foreign relations power have been largely developed from the rules of international law concerning sovereignty, rather than found in any specific constitutional grant. *Jones* v. *United States*, 137 U. S. 202, 212; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707–711; Cf. *Mackenzie* v. *Hare*, 239 U. S. 299, 311.[5]

2. *The President's role in the conduct of foreign affairs.*—The first draft of the Constitution, submitted by Mr. Pinckney on May 29, 1787, followed the example of Art. IX of the Articles of Confederation. It placed the foreign relations powers in the Senate[6] by giving it the "sole and exclusive power * * * to make treaties and to appoint Ambassadors" (Art. VII), while reserving to the President merely the ceremonial function of "receiv[ing] public Ministers from foreign nations" (Art. VIII).[7]

Further reflection, however, convinced the members of the Constitutional Convention that the transaction of foreign relations, especially in view of its need for speed and secrecy, was essentially an executive function, to be subject to Senatorial control in those instances where the gravity of possible commitments made such checks desirable.[8] As early as June 18, 1787, Alexander Hamilton submitted a constitutional

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Chae Chan Ping v. *United States* (*The Chinese Exclusion Case*), 130 U. S. 581, 604.

[5] Cf. George Sutherland, *The Powers of the National Government*, Sen. Doc. No. 417, 61st Cong., 2d Sess., p. 7.

[6] 2 Curtis, *History of the Constitution of the United States*, 410.

[7] 3 Farrand, *Records of the Federal Convention*, 599.

[8] *The Federalist*, Nos. 64 and 75; Mr. Davie's Speech in the North Carolina Convention, 3 Farrand, *Records of the Federal Convention*, 347–399.

sketch which shifted the power to make treaties and to appoint ambassadors to the President, under Senatorial control.[9] On August 15, Mr. Mercer declared that the Senate ought not to have the treaty-making power, since it was an executive function.[10] A week later, on August 23, James Madison remarked that the President should take part in the making of treaties, since the Senate represented the States alone.[11]

Viewed against this background, the final constitutional text discloses a deliberate design to place the foreign relations power in the President, subject to the controls expressly provided for. This is the way the Constitution was understood almost from the beginning. On April 24, 1790, Thomas Jefferson, then Secretary of State, gave the following official opinion:

> * * * The transaction of business with foreign nations is Executive altogether. It belongs, then, to the head of that department except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.[12]

Ten years later, on March 7, 1800, during the debate involving the extradition of Jonathan Robbins, John

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[9] 1 Farrand, *Records of the Federal Convention*, 292; see also 3 Farrand, *ibid.*, 619, 624–625.

[10] 2 Farrand, *ibid.*, 297.

[11] 2 Farrand, *ibid.*, 392.

[12] *The Writings of Thomas Jefferson* (Memorial ed.), Vol. III, pp. 15, 16. See also the similar remarks of Madison in the House of Representatives, *Annals of Congress*, 1st Congress, cols. 463–464, 496, and Crosskey, *Politics and the Constitution of the United States*, Vol. 1, pp. 417–418.

Marshall stated in the House of Representatives, of which he was then a member:

> * * * The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. * * *
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> * * * * *
>
> The Executive is not only the Constitutional department, but seems to be the proper department to which the power in question may most wisely and most safely be confided.
>
> The department which is entrusted with the whole foreign intercourse of the nation * * *.[13]

It is noteworthy that this statement, limited to the conduct of *foreign affairs,* did not arouse antagonism such as that brought on by Hamilton's assertion in the Pacificus papers that the President had all the *executive* powers.[14] On the contrary, it persuaded a large portion of the Republican opposition and secured the support of the administration, and obtained a vote of 61 to 35 in a House almost evenly divided on a party basis.[15] See also the Report of the Senate Committee on Foreign Relations, of February 15, 1816, partially quoted in *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 319.

It is unnecessary to recall in detail that the Court has repeatedly reaffirmed, in recent years, the conceptions underlying Jefferson's and Marshall's declarations. "In this vast external realm, with

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[13] *Annals of Congress,* 6th Congress, cols. 613–614.

[14] Cf. the *Helvidius Papers,* 1 Madison, *Letters and Writings* 607–654.

[15] Beveridge, *The Life of John Marshall,* Vol. 2, pp. 473–475. The shrinkage of the Senate's role in the negotiation of treaties, in which it has an express place under the Constitution, has often been told. See Corwin, *The President—Office and Powers* (1948 ed.), pp. 253 ff.

its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. * * * the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–320; see also *United States* v. *Belmont*, 301 U. S. 324, 330; *United States* v. *Pink*, 315 U. S. 203, 222–223, 229–230; *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 109; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 542; cf. *Latvian State Cargo and Passenger Steamship Line* v. *McGrath*, 188 F. 2d 1000 (C. A. D. C.), certiorari denied, 342 U. S. 816; *The Maret*, 145 F. 2d 431 (C. A. 3); *Bernstein* v. *Van Heyghen Freres S. A.*, 163 F. 2d 246, 249 (C. A. 2), certiorari denied, 332 U. S. 772.

3. *The Treaty Clause and executive agreements.* Under Article II, Section 2, of the Constitution, the President

> shall have Power, by and with the Advice and Consent of the Senate, to make Treaties * * *.

"Treaties," however, are not the only means by which international transactions are conducted. Diplomatic practice recognizes a number of other less formal arrangements, such as *modi vivendi*, exchanges of notes, and other executive agreements—"a bargain between independent states which is something less than a treaty"[16]—without which, in the words of

[16] Baldwin, *The United States as a Great Power*, 9 Yale Review (Old Series) 399, 414.

John Bassett Moore, "current diplomatic business could not be carried on."[17] As a sovereign nation, the United States has, and must have, the capacity to enter into these lesser agreements (*supra*, pp. 52a–55a). Since the President is the nation's instrument in external affairs (*supra*, pp. 55a–58a), his is the department empowered to make such agreements, unless the Constitution provides otherwise in the Treaty Clause. But that carefully drawn clause does not stand in the way. Its terms and history, as well as the practice of a century and a half and the decisions of this Court, show that the formal treaty, consented to by the Senate, is not the only

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[17] Moore, *Treaties and Executive Agreements*, 20 Political Science Quarterly 385, 389.

On executive agreements, see, generally, Hackworth, *Digest of International Law*, Vol. 5, pp. 392–397; 5 Moore, *International Law Digest*, 210–221; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), 102; Baldwin, *The United States as a Great Power*, 9 Yale Review (Old Series) 399; Foster, *The Treaty-Making Power under the Constitution*, 11 Yale L. J. 69; Barnett, *International Agreements without the Advice and Consent of the Senate*, 15 Yale L. J. 18, 63; Sayre, *The Constitutionality of the Trade Agreements Act* (1939), 39 Col. L. Rev. 751; Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States* (1940), 35 Ill. L. Rev. 365; Riesenfeld, *International Relations*, 25 Cal. L. Rev. 643, 670–672; Borchard, *Executive Agreements and Treaties*, 53 Yale L. J. 664, 669–670, n. 20, 673–675; Comment: *Executive Agreements and the Proposed Constitutional Amendments to the Treaty Power*, 51 Mich. L. Rev. 1202, 1206–1207; Treaties and Executive Agreements, Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 83d Cong., 1st Sess., on S. J. Res. 1, etc., pp. 837, 853–861; Sen. Doc. No. 170, 82d Cong., 2d Sess. (1953), *The Constitution of the United States—Analysis and Interpretation*, edited by Edward S. Corwin, pp. 433 *ff.*; cf. *Watts* v. *United States*, 1 Wash. Ter. 288, 294.

mechanism the United States can employ to attain international agreement.

a. In the vocabulary of the members of the Constitutional Convention, the term "treaty" did not cover every type of arrangement with a foreign nation. The very text of the Constitution proves this. Art. I, Sec. 10, carefully distinguishes between a "Treaty, Alliance and Confederation" which the States are absolutely prohibited from entering, and an "Agreement or Compact with another State, or with a foreign Power" which the States can make only with the consent of Congress. The draftsmen of the Constitution obviously made a distinction between treaties and compacts;[18] and since the records of debates of the Convention are silent on this point, the terms "treaty" and "agreement" or "compact" must have had distinct connotations to the meticulous members of the Convention.[19] Apparently, they were aware of the distinction made between treaties and less formal agreements in contemporary international law as evidenced by the writings of Vattel, whose teachings exerted a profound influence upon American statesmen and lawyers during the revolutionary

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[18] *Cf.* Taney, C. J., in *Holmes v. Jennison*, 14 Pet. 540, 571–572 (on the Compact Clause): "But the question does not rest upon the prohibition to enter into a treaty. In the very next clause of the constitution the states are forbidden to enter into any 'agreement' or 'compact' with a foreign nation: and as these words could not have been idly or superfluously used by the framers of the constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive."

[19] Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts?"*, 3 University of Chicago L. Rev. 453, 457.

period and virtually the first hundred years of the Republic.[20]

Vattel distinguishes between treaties which are "entered into by sovereigns for the welfare of the State, either in perpetuity or for a considerable length of time," and "agreements, conventions [or] arrangements" "which have for the object matters of temporary interest."[21] It is significant that two of the earliest interpretations of the Compact Clause refer to these portions of Vattel in order to explain the distinc-

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[20] Nussbaum, *A Concise History of the Law of Nations* (Rev. Ed.), p. 161, 162; Butler, *The Treaty-Making Power of the United States*, Vol. 1, Sec. 152; Weinfeld, *ibid.*, at 458 *ff.* Lapradelle, Emer de Vattel in 3 Vattel, *The Law of Nations* (Carnegie ed.) xxix-xxxx. Levitan, *Executive Agreements*, 35 Ill. Law Review 365, 366-370. Thus, when the publisher of Vattel's *Laws of Nations* sent Benjamin Franklin three copies of the book in 1775, Franklin answered: "I am much obliged by the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising State make it necessary frequently to consult the law of nations." 2 Wharton, *Revolutionary Correspondence*, 64. Vattel was cited in the first reported decision of a federal court, *The Resolution*, 2 Dall. 1, 15 (Federal Court of Appeals) (1781), and by both sides in *Respublica* v. *De Longchamps*, 1 Dall. 110, 112 (Oyer & Terminer, Philadelphia, 1784). James Wilson, "esteemed as the most learned lawyer of his generation" (Reeves, *The Influence of the Law of Nature upon the International Law of the United States*, 3 Am. Journ. of Int. Law, 546, 552-553), was counsel in both cases. And see his reference to Vattel in the Pennsylvania Convention called to ratify the Federal Constitution, 2 Elliott, *Debates*, 454; Vattel was also cited to the South Carolina Convention, 4 Elliott, *Debates*, 277-278, 310. The first draft of the Constitution which distinguished between Treaties and Agreements was written in Wilson's handwriting. 2 Farrand, *Records of the Federal Convention* 163, 169.

[21] Vattel, *The Law of Nations* (Carnegie ed.), Vol. III, p. 160; Weinfeld, *ibid.*, at 460.

tion between "treaties" and "agreements" or compacts.[22]

From Vattel and like publicists, the framers of the Constitution must have known that, in international usage, the term "treaty" does not cover all agreements with foreign nations. And by limiting the requirements of senatorial advice and consent to "treaties,"[23] they left undisturbed the power of the President, as the Nation's sole organ in the field of foreign rela-

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[22] Tucker, *Blackstone's Commentaries*, Vol. I, App. pp. 309, 310 (1803), and Chief Justice Taney in *Holmes v. Jennison*, 14 Pet. 540, 572. Mr. Tucker, a contemporary of the members of the Constitutional Convention (Weinfeld, *ibid.*, at 461), paraphrased Vattel in defining treaties as referring to "subjects of great national magnitude and importance * * * often perpetual or made for a considerable period of time. Mr. Justice Story, while feeling that this formula was at best a very loose and unsatisfactory exposition (2 Story, *Commentaries on the Constitution of the United States*, Section 1402), suggested that the term "treaties" applied to "treaties of a political character," while "compacts and agreements" "might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land, situated in the territory of each other; and other internal regulations for the mutual comfort and convenience of states, bordering on each other" (*ibid.*, Section 1403). Compare the concept of International Administrative Law coined by L. v. Stein, *Einige Bemerkungen über das Internationale Verwaltungsrecht*, 6 Schmoller's *Jahrbuch fur Gesetzgebung etc.* (1881), 395, 430 *ff.* While Vattel's formulation of the distinction between treaties and other agreements may have been imperfect and groping, it evidences the recognition, by the middle of the 18th century, that a new, informal type of international arrangement had come into being.

[23] It will be noted that Hamilton's draft constitution (*supra*, pp. 55a–56a) required senatorial advice and consent for "all treaties, conventions and *agreements*." 3 Farrand, *Records of the Federal Convention*, 624–625 (emphasis added).

tions, to enter into agreements of lesser importance, shorter duration, or different character.[24]

b. Congress and the Executive have recognized since the earliest days of the Republic that the foreign relations of the United States are not to be conducted exclusively by treaty. As early as 1792, the Post Office Act authorized the Postmaster General to "make arrangements with postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the postoffices."[25] These were not treaties in the constitutional sense. If they had been, Congressional authorization would be of no avail to the President in the absence of the advice and consent of two-thirds of the Senators present.

Ever since the first decade under the Constitution, the President has entered into a large number of executive agreements, many with and many without

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[24] The records of the Constitutional Convention indicate that when its members were referring to "treaties" they were thinking primarily of peace treaties and other treaties vitally affecting the fundamental interests of the Nation or of the States, such as their territorial integrity, or fishing and navigation rights, which were all-important in the 18th century. Farrand, *Records of the Federal Convention*, Vol. II, pp. 297–298, 540–543, Vol. IV (Rev. ed., 1937), p. 58; see also the informative letter of Mr. Williamson to James Madison, *ibid.*, Vol. III, p. 306–307; Warren, *The Making of the Constitution*, pp. 653–658; Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 George Washington University Law Review 271, and Mr. Warren's testimony in Hearings before Subcommittee No. 3 of the Committee on the Judiciary, etc., House of Representatives, 78th Cong., 2d Sess., on H. J. Res. 6, etc., Serial No. 21, pp. 79–88.

[25] Sec. 26, 1 Stat. 232, 239. The Congressional debate discloses that the Second Congress was in no mood to enhance the power of the Executive. Cf. *Annals of Congress*, 2d Congress, cols. 230–236, 238–241.

the consent of Congress.[26] Agreements made under Congressional or Senatorial authorization, or later ratified or confirmed, have included a variety of subjects, *e. g.*, reciprocal trade, lend-lease, civil air routes and services, double taxation, importation of agricultural workers, etc.[27] Those made without legislative consent or authorization have been of several types and with many nations. They have also covered many subjects, from the most trivial matters of diplomatic ceremony to more important arrangements of commercial or military consequence. "Among these are such as apply to minor territorial adjustments, boundary rectifications, the policing of boundaries, the regulation of fishing rights; private pecuniary claims against another government or its nationals, in Story's words, 'the mere private rights of sovereignty.'"[28] There have also been understandings as to the passage of troops, and commercial matters, including arrangements as to imports and exports and customs reciprocity.[29] For example, the 1907 "Gentlemen's Agreement" with Japan, pursuant to which Japan agreed not to issue any passports to its citizens for immigra-

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[26] For their description and enumeration, see the authorities cited fn. 15, pp. 59a–60a, *supra*, and fns. 27, 36, *infra*. Moore's 1905 article is the early classic in this field.

[27] See a memorandum prepared by the Department of State in 1953, and reprinted in Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 83rd Cong., 1st Sess., on S. J. Res. 1 and S. J. Res. 43 ("Treaties and Executive Agreements") (February, March, April 1953), at pp. 853 *ff.*

[28] Sen. Doc. No. 170, 82d Cong., 2d Sess. (1953), *The Constitution of the United States of America—Analysis and Interpretation*, edited by Edward S. Corwin, at p. 433, see also fn. 22, *supra*, p. 62a.

[29] See Sayre, *The Constitutionality of the Trade Agreements Act*, 39 Col. L. Rev. 751, especially the Appendix at 770–775.

tion to the United States, was a Presidential arrangement. Cf. Willoughby, *The Constitutional Law of the United States* (2d ed.), Vol. I, Section 287.

Many of these agreements may be said to have some sanction in powers expressly conferred on the President by the Constitution, such as his power as Commander-in-Chief[30] or his authority to receive foreign ambassadors.[31] However, a large and extremely important portion of them such as certain types of commercial agreements, boundary arrangements, and the settlement of claims,[32] do not find any express basis in the Constitution and rest exclusively on the President's general power over foreign relations. And even those agreements which can be tied to a specific executive power find their main support in the President's position as the country's representative in foreign affairs. For instance, the Litvinov Assignment, with its significant debt arrangement, does not stand simply on the constitutional provision that the President "shall receive Ambassadors

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[30] *E. g.*, Armistices and other military arrangements; *cf.* Moore, *Treaties and Executive Agreements*, 20 Political Science Quarterly 385, 390-392; Crandall, *Treaties, Their Making and Enforcement* (2d ed.), Sec. 56.

[31] Cf. the Litvinov Assignment, the validity of which was upheld in *United States* v. *Belmont*, 301 U. S. 324, and *United States* v. *Pink*, 315 U. S. 203.

[32] In *United States* v. *Pink*, 315 U. S. 203, 240, the concurring opinion of Mr. Justice Frankfurter stated: "That the President's control of foreign relations includes the settlement of claims is indisputable. * * * The President's power to negotiate such a settlement is the same whether it is an isolated transaction between this country and a friendly nation, or is part of a complicated negotiation to restore normal relations, as was the case with Russia." See also *Monaco* v. *Mississippi*, 292 U. S. 313, 331; Moore, *Treaties and Executive Agreements*, 20 Political Science Quarterly 385, 403-408.

and other public Ministers" (Art. II, Sec. 3). See *United States* v. *Pink*, 315 U. S. 203, 229–230, 240. The historical fact is that the President's general foreign affairs power, rather than some special or limited provision of the Constitution, supplies an important basis for many arrangements he has made in the last century and a half.[33]

There thus exists a usage, going back to the earliest years of the country, that not all the dealings of the United States with foreign nations have to take the form of treaties and that the President may enter into many types of arrangements in his capacity as the sole organ of the Nation in the field of foreign relations. This constitutional usage, on the basis of which the United States has entered into many scores of Presidential agreements, is indicative of the scope of the President's power. *Ex parte Quirin*, 317 U. S. 1, 42; *Inland Waterways* v. *Young*, 309 U. S. 517; *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 473; *Field* v. *Clark*, 143 U. S. 649, 691.

c. Though this Court has not often had the opportunity to consider executive agreements, it has affirmatively held that the category of "treaty" does not exhaust our arrangements with foreign powers and that the President may conclude executive agreements which are not treaties. In *Altman & Co.* v. *United States*, 224 U. S. 583, 601, the Court confirmed the existence of agreements not "possessing the dignity of one requiring ratification by the Senate." In *Monaco* v. *Mississippi*, 292 U. S. 313, 331, it pointed out that the adjustment of claims need not necessarily

[33] Others, of course, are based upon specific authorizations to the Executive contained in statutes or treaties, *e. g.*, tariff concession agreements are authorized by Section 350 of the Tariff Act of 1930, as amended, 19 U. S. C. 1351.

take the form of treaties. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318, unequivocally stated that the foreign relations power of the United States included the authority "to make such international agreements as do not constitute treaties in the constitutional sense." *United States* v. *Belmont*, 301 U. S. 324, 330–331, and *United States* v. *Pink*, 315 U. S. 203, 229–230, likewise upheld the President's power to enter into executive agreements without senatorial participation.[34]

Specifically, an executive agreement entered into by the President pursuant to statutory authority has been held by this Court to have the same status as a treaty for the purpose of applying legislation relating to appeals to this Court (*Altman & Co.* v. *United States*, 224 U. S. 583), and it has been held that the President had power to make, without statutory authorization or Senate participation, the Litvinov Assignment incident to the recognition of the Soviet Union. *United States* v. *Belmont*, 301 U. S. 324, 331–332; *United States* v. *Pink*, 315 U. S. 203, 230.

As in the case of treaties, executive agreements can be modified or overridden, for domestic purposes, by subsequent legislation. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 720; *Moser* v. *United States*, 341 U. S. 41, 45. And like all other governmental power in the United States, this "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations * * * must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320. Together with statutes and treaties, executive

[34] See also *Ozanic* v. *United States*, 188 F. 2d 228, 231 (C. A. 2); *Etlinger S. A.* v. *United States*, 123 C. Cls. 552, 572.

agreements are subject to the Bill of Rights and the other clauses of the Constitution[35] which protect all Americans from the excesses of official authority. See *Reid* v. *Covert*, No. 701, Oct. Term 1955, decided June 10, 1957, slip op., pp. 14–17 (opinion of Mr. Justice Black).[36]

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[35] In *United States* v. *Belmont*, 301 U. S. 324, 332, and *United States* v. *Pink*, 315 U. S. 203, 226, the Court assumed that an executive agreement may not violate the Fifth Amendment.

[36] Past practice indicates that international agreements have been cast in the form of treaties or executive agreements, depending upon a number of variables, such as their importance, duration, subject matter, and the degree to which the United States enters into binding commitments. (See 39 Op. A. G. 484, 487.) Like most decisions on the distribution of functions between branches of government, the determination of the matters appropriate for an executive agreement calls for informed "political judgment" and does not lend itself to an exact formula. Cf. George Sutherland, *Constitutional Powers and World Affairs*, 121; Arthur E. Sutherland, *Restricting the Treaty Power*, 65 Harv. L. Rev. 1305, 1324, 1329, and the authorities there cited. Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, fn. 37, point out that the classification of treaties and compacts under Art. I, Section 3, of the Constitution is based at least in part upon "political judgment." As former Assistant Secretary of State Sayre has said (Sayre, *The Constitutionality of the Trade Agreements Act*, (1939), 39 Col. L. Rev. 751, 755):

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.

Foreign countries seem to apply similar tests. Lauterpacht's Oppenheim, *International Law* (8th ed.), Vol. I, Sec. 512;

McNair, *The Law of Treaties*, p. 86; Laband, *Staatsrecht des Deutschen Reichs* (5th ed.), Vol. II, 153–155. Art. 59 (2) of the Constitution of German Federal (Bonn) Republic, expressly provides for "administrative" agreements (Verwaltungsabkommen). The Austrian and Italian Constitutions (Arts. 50 and 80, respectively) require legislative consent to treaties which are of a political nature. The Swiss practice is strikingly similar to the American. See Fleiner-Giacommetti, *Schweizerisches Bundesstaatsrecht*, 825–829.

U. S. GOVERNMENT PRINTING OFFICE: 1987